DOCUMENT RESUME

ED 254 000 EC 171 709

TITLE	Due Process: Developing Criteria for the Evaluation of Due Process Procedural Safeguards Provisions. Exploring Issues in the Implementation of P.L. 94-142.
INSTITUTION	LINC Resources, Inc., Columbus, Ohio.; Research for Better Schools, Inc., Philadelphia, Pa.
SPONS AGENCY	Bureau of Education for the Handicapped (DHEW/OE), Washington, D.C.
PUB DATE	May 79
NOTE	189p.
PUB TYPE	Viewpoints (120) -- Collected Works - General (020)
EDRS PRICE	MF01/PC08 Plus Postage.
DESCRIPTORS	*Compliance (Legal); *Disabilities; *Due Process; Elementary Secondary Education; *Federal Legislation; Program Implementation
IDENTIFIERS	*Education for All Handicapped Children Act

ABSTRACT

Three papers were commissioned to address ways of evaluating implementation of the due process procedural safeguards provision of P.L. 94-142, the Education for All Handicapped Children Act. Milton Budoff presents a social science view in "Implementing Due Process Safeguards: From the User's Viewpoint." Donald Bersoff follows with an in-depth explanation of due process safeguards for parents, children, and school systems ("Procedural Safeguards"). In the final paper, Lawrence Kotin offers "Recommended Criteria and Assessment Techniques for the Evaluation by LEAs of Their Compliance with the Notice and Consent Requirements of P.L. 94-142." Summary discussions of the papers by a panel of educators is included along with recommendations to help local school districts implement the due process provisions of P.L. 94-142. (CL)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

Exploring Issues in the Implementation of P.L. 94-142

U.S. DEPARTMENT OF EDUCATION
NATIONAL INSTITUTE OF EDUCATION
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

☑ This document has been reproduced as received from the person or organization originating it.

☐ Minor changes have been made to improve reproduction quality.

- Points of view or opinions stated in this document do not necessarily represent official NIE position or policy.

DUE PROCESS

Developing Criteria for the Evaluation of Due Process Procedural Safeguards Provisions

Department of Health, Education and Welfare
Office of Education
Bureau of Education for the Handicapped

RESEARCH FOR BETTER SCHOOLS, INC.
444 North Third Street, Philadelphia, Pennsylvania 19123

May 1979

Published by Research for Better Schools, Inc.

©1979 LINC Services, Inc. All rights reserved. For permissions and other rights under this copyright, contact Research for Better Schools, Inc., 444 North 3rd Street, Philadelphia, Pennsylvania, 19123.

U.S. Copyright is claimed until 1986. Thereafter in the U.S. only, all portions of this work covered by this copyright will be in the public domain. Copyright in other countries remains in effect.

This work was developed under a contract or grant with the Bureau of Education for the Handicapped, U.S. Office of Education, Department of Health, Education and Welfare. However, the content does not necessarily reflect the position or policy of BEH/USOE/HEW, and no official endorsement of these materials should be inferred.

TABLE OF CONTENTS

Foreword — Page

Acknowledgements

Part A **Introduction** 5
Overview of the Study by Linda G. Morra

Part B **Approaches to Evaluate Implementation of the Due Process Procedural Safeguards Provision of P. L. 94-142** 13

Section

1. Implementing Due Process Safeguards: From the User's Viewpoint 15
   Milton Budoff

2. Procedural Safeguards 63
   Donald N. Bersoff

3. Recommended Criteria and Assessment Techniques for the Evaluation By LEAs of Their Compliance with the Notice and Consent Requirements of P. L. 94-142 143
   Lawrence Kotin

Part C **The View From the Panel** 179

FOREWORD

The papers printed here were commissioned by the Bureau of Education for the Handicapped to investigate issues of quality in the implementation of the Due Process Procedural Safeguards provisions of P.L. 94-142 (Section 615 of the Education of the Handicapped Act). A panel of educational practitioners was also convened to discuss the papers and provide recommendations to the Bureau. Their comments, together with the papers, represent the most recent thinking and activities of a number of highly qualified professionals. While the views expressed in the papers are those principally of the authors, each writer has drawn upon the experiences, writings, research, and observations of various other educators in addition to their own. The care with which both the authors and the panelists shared their thoughts and ideas is obvious throughout this publication. It is our hope that this document will not only be informative, but that it will stimulate other thoughts on the evaluation of effectiveness of implementation.

Edwin W. Martin
Deputy Commissioner
Bureau of Education for the Handicapped

ACKNOWLEDGEMENTS

Many have helped BEH in conducting the Criteria Study. Special thanks are due to staff at Buffington & Associates who played an important role in arranging the panel meeting and assembling the developed papers into this monograph. Appreciation is extended to Adrienne McCollum for her overal project direction, and to Angela Edwards, Assistant Project Director, for coordination of the countless details involved in setting up the panels and producing the monograph. Acknowledgement is also made of the efforts of Frances Fuchs in assistance with the development of study questions for the panel, and P. W. Robinson for support services.

As considerable "in-house" efforts also went into this study, special thanks are also in order for State Program Studies Branch staff – Mary Kennedy, Kathleen Fenton, Lou Danielson, Pat Morrissey, and Jim Maxwell – for review of drafts of the study papers. Finally, appreciation is extended to the authors of papers, and other panel participants, for their insights and suggestions.

Linda G. Morra
Project Officer
Bureau of Education for the Handicapped

PART A

Introduction: Overview of the Study

Linda G. Morra

Bureau of Education for the Handicapped

A major purpose of P.L. 94-142, the Education for All Handicapped Children Act of 1975,* is to assure that the rights of handicapped children and their parents or guardians are protected. In developing the P.L. 94-142 legislation, Mr. Randolph (Congressional Record – Senate, November 19, 1975, p. S20427) addressed these rights:

> Another important feature of this legislation concerns the expansion of due process procedures in existing law. By building on those safeguards of due process in Public Law 93-380, we will assure handicapped children and their parents or guardian the right to have written prior notice whenever the educational agency plans to initiate, change – or refuses to change or initiate – the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child: the right to examine relevant records: the right to have an opportunity to present complaints: and the right to have an impartial due process hearing.

Section 615 of the Education of the Handicapped Act details the procedures which must be followed by educational agencies to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education. That is, when a decision or potential decision affecting a child's educational environment is faced, the child's parents or guardians must have the opportunity to be heard, as well as the right to impartial resolution of conflicting positions.

Under Section 615, educational agencies seeking to qualify for P.L. 94-142 (Part B of the EHA) funding must establish procedures for parents and guardians to examine their child's records and to obtain an independent evaluation of their child, to receive prior written notice throughout the educational decision-making process, to have an opportunity to present complaints, and rights to an impartial hearing and appeal. Procedures must also be established by which a surrogate parent, under certain conditions, must be appointed. In addition to writing these procedures into P.L. 94-142, the Congress directed the Commissioner of Education to issue implementing rules. The Bureau of Education for the Handicapped (BEH), subsequently developed and published regulations on P.L. 94-142 (45CFR Part 121a). These regulations are used by BEH staff as the basis of a Program Administrative Review (PAR) procedure which has been developed by BEH for monitoring implementation of P.L. 94-142, including the due process provisions.

---

*P.L. 94-142 amends Part B of the Education of the Handicapped Act (EHA) which authorizes a formula-grant program to assist states in providing free appropriate public education to handicapped children.

THE DUE PROCESS REGULATIONS

The P.L. 94-142 regulations provide a framework for implementing the due process provisions, but, by intent, leave many details to state and/or local educational agency discretion. Notice and consent are two rights which are central to the due process protections. Examination of the notice and consent regulations illustrates the types of decisions for State and/or local education agency consideration.

Section 121a.504 of the regulations requires that written notice be given to parents of a handicapped child a reasonable time before the public agency proposes — or refuses — to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child. One issue which must be resolved by the State and/or local education agency is the timing of notices. What constitutes "a reasonable period of time"? The response to this question has implications for the extent to which parents have opportunity to be involved in the decision. A notice concerning a proposed evaluation of a child can represent a decision made by school personnel that a child needs an evaluation, or it can indicate that school personnel are considering the need for evaluation of the child and that decision will be made in the near future.

Another example from Section 121a.504 of the regulations is a provision which requires that parental consent be obtained before the educational agency conducts a preplacement evaluation or makes an initial placement of a handicapped child in a program providing special education and related services. Consent is defined in Section 121a.500 to mean, in part, that (1) the parent has been fully informed concerning all matters pertinent to the decision (in the native language or other form of communication of the parent), and (2) the parent understands and agrees in writing to the carrying out of the activity. An issue for State and local education agency consideration is the working definition of informed consent. For example, should the mailed notice concerning preplacement evaluation simply include a space for the parent to indicate consent to the activity? Should parents participate in a meeting to discuss need for a preplacement evaluation on their child? How can school personnel ensure that parents understand the implications of the decision concerning their child?

Examples have been given of several issues facing State and local education agencies as they implement P.L. 94-142 due process provisions. At the school district level, the problem can be stated as, what would exemplary implementation of the due process safeguards look like? The Bureau of Education for the Handicapped is interested in assisting States by supporting the development and dissemination of exemplary implementation procedures. State education agencies (SEAs), responsible under P.L. 94-142 for monitoring local implementation of the due process provisions and providing technical assistance, must take the lead in developing State standards for implementation. Finally, local education agencies (LEAs) must conduct their own internal evaluations of due process safeguards implementation. The following section describes an approach undertaken to investigate the issue of quality or exemplary procedures.

THE APPROACH

It is evident that for questions concerning quality to be addressed, criteria are needed which can be used to evaluate implementation. To stimulate thought regarding definitions of quality, the BEH undertook a study in October, 1977 to explore issues of quality in implementation of four major provisions of P.L. 94-142. This monograph summarizes activities related to one of those provisions – due process procedural safeguards. The study had two major parts. First, three papers were commissioned to provide professional judgements of quality implementation of the due process provisions. Second, a panel of education practitioners was convened to discuss the papers and make recommendations to BEH concerning their value and use.

In conceptualizing the study, it was recognized that evaluation never takes place in a vacuum; standards are always involved. Judgements of the performance of a program or procedures are measured against either explicit or implicit standards. Standards are derived from experience, knowledge, and/or values. The difficulty is that standards will vary according to whose experience, knowledge, and values serve as the basis for the standards. For example, the regulations in Section 121a.514 concerning surrogate parents state that a person selected as a surrogate parent must have no interests which conflict with the interests of the child, and must have knowledge and skills that ensure adequate representation of the child. If the regulations were more specific, they would be likely to be inflexible. Those implementing the regulations, however, will need to expand on surrogate parent qualifications. Criteria for evaluating implementation of this provision would be apt to vary depending on one's values concerning necessary qualifications. For example, is it critical that the surrogate be of the same cultural and language background of the child? Is it essential that the surrogate parent know the special education laws, have expertise concerning the handicapping condition of the child, be knowledgeable concerning special education programming, and be familiar with the school system?

Because a variety of standards is possible, authors were selected for this study whose experience, knowledge, and values would tend to be disparate. Naturally, the three papers do not represent all the possible standards of quality which could be identified. They do represent, however, three different approaches to the difficult issue of quality in relation to implementation of the due process provisions.

Authors were provided guidelines which first expanded on the subject of qualitative implementation of the due process provisions. Progress in implementation was conceptualized as a continuum; conformance with the letter of the law was viewed as one end of the continuum (minimal implementation), while a full meeting of the intent or spirit of the law would form the other (maximal) end of the continuum. Authors were to use this concept of progress in implementation in developing their papers.

Secondly, the guidelines requested that authors develop criteria that would be applicable at the LEA level (or to any "public agency" directly responsible for educating handicapped children). Thus, the developed criteria could be used by LEAs interested in evaluating their own progress in implementation of the due process provisions, as well as by SEAs in conducting their own evaluations. The guidelines further indicated that criteria which would involve the collection of data either already available or relatively accessible to LEAs at a low cost of both time and money would be most useful.

Third, authors were requested to develop criteria for determining: (1) the quality of procedures undertaken by LEAs to implement the due process provisions of the law, and (2) the effectiveness of the due process procedures implemented by LEAs. Thus, authors of position papers were to *develop criteria* which could be used by LEAs as approximate indicators of the extent to which due process safeguards implemented by LEAs meet both the letter and intent or spirit of the law, and the extent to which they are effective. Given the extensiveness of the due process regulations, authors were requested to focus in particular on the notification and consent requirements.

Fourth, authors were asked to provide a rationale or justification for their criteria. It was expected that P.L. 94-142 and its regulations would provide a base for the development of criteria. For those criteria used as indicators of maximal implementation, authors were expected to draw from theory, research findings, the Congressional Record, personal experience, or personal knowledge of current practices. Where criteria did exceed the requirements of the law and regulations, authors were to indicate that the criteria represented desirable but not mandatory standards.

Fifth, the guidelines acknowledged the interrelationship of the due process provisions of P.L. 94-142 with other provisions – the individualized education program provision, protection in evaluation procedures, and least restrictive environment provisions. Authors were requested to restrict themselves as closely as possible to the due process provisions.

Finally, the guidelines requested that authors of due process position papers consider different kinds of contextual influences on LEA implementation of the provision. Variables for consideration included, for example, the urban, rural, or suburban nature of the LEA and the length of time the LEA had been implementing SEA policies similar to P.L. 94-142. Authors were to determine whether a general set of criteria for determining progress in implementation of the due process provisions could be used in varied contexts, or alternately, whether multiple sets of criteria were needed for LEAs in different contexts.

In the initial formulation of the study, some thought was given to later development of self-study guides which could be provided as a form of technical assistance to SEAs and/or those LEAs who wanted to evaluate progress in implementation. Over time, the position papers were conceptualized as an exploratory investigation concerning the feasibility of producing self-study guides on evaluation of implementation of the due process provisions. The papers were not to be the prototype self-study guides. From their efforts to develop criteria, however, determination of the feasibility of the task might be made.

THE DUE PROCESS CRITERIA STUDY PANEL

The second part of the study involved bringing together a group largely of education practitioners to discuss the position papers and provide recommendations to BEH. More specifically, the purpose of the panel was stated as follows: To determine the feasibility of developing self-study guides which could be used by state and/or local education agencies to evaluate implementation of the due process provisions of P.L. 94-142. Feasibility was defined to include topics such as field-testing and dissemination, as well as content and format of possible guides.

The panel meeting was structured into three distinct parts. First, authors presented summaries of their papers and responded to questions. Second, a large group discussion was held concerning issues related to this study. Finally, three small groups were formed to develop recommendations for BEH. For the second and third activities, study questions were distributed to panelists prior to the meeting. These questions were intended to stimulate discussion and the formulation of additional questions by panelists.

Questions for the large group session concentrated on the conceptualization of the study as presented in the guidelines for authors and also as presented by the actual position papers. For example, a series of questions addressed the concept of progress towards implementation, and questions were posed regarding whether all of the alternative criteria generated by the authors were indicative of implementation meeting the spirit of the law. One major question asked of the group was whether, in fact, BEH could support any further activities based on this study without giving the impression that developed standards were Federal standards. It was stressed that BEH did not want to give the appearance of sanctioning specific standards. By legislative intent, SEAs have been given flexibility in implementation.

The group then was divided into three smaller working groups to develop specific recommendations to BEH on the possible development, field-testing, and dissemination of self-study guides. Specific questions posed for these groups involved the developers of the guides, comprehensiveness of developed guides as well as field-testing and dissemination efforts, the format of self-study guides and field-testing activities, and the utility of field-testing developed self-study guides. Questions were asked additionally which requested strategies for increasing utility of the guides to LEAs.

The number of panelists was intentionally designed to be small. It was felt that a small group would encourage an informal atmosphere and lively exchange of ideas. In selecting educational practitioners for the panel, emphasis was placed on representation from state and local education agencies.

The next part of this monograph presents the three position papers. As is soon evident upon reading the papers, the authors varied in their interpretations of the task and the emphasis placed on notice and consent requirements. The papers have *not* been reviewed to ensure that Federal statutory and regulatory requirements are accurately stated. Readers seeking to fully understand the Federal requirements are encouraged to read the regulations for Part B of the Education of the Handicapped Act (45 CFR Part 121a; published at 42 FR 42473; August 23, 1977; and supplemental procedures for evaluating specific learning disabilities at 42 FR 65082; December 29, 1977).

PART B

Approaches to Evaluate Implementation of the Due Process Procedural Safeguards Provisions of P.L. 94-142

SECTION I

Implementing Due Process Safeguards: From the User's Viewpoint

Milton Budoff

BUDOFF, MILTON. Dr. Budoff is founder and director of the Research Institute for Educational Problems. He received his Ph.D. at the University of Chicago in 1958. Dr. Budoff has directed research and training activities in the area of non discriminatory testing by developing training-based assessment procedures for children from minority/economically poor backgrounds-measures of learning potential. He conducted studies of the effects of the integration of special class EMRs on the handicapped and nonhandicapped children in social acceptance, observed behavior in special and regular classes and in the academic and other achievements of the former special class students. Dr. Budoff is presently completing studies of the due process system in Massachusetts, focused mainly on the responses of participants in the appeals process, and studies of the effects of labeling handicapped children.

INTRODUCTION

This paper was commissioned by the BEH as part of a series to explore and develop criteria which school systems might employ in examining the extent and quality of their implementation of the due process safeguards.

As part of this effort, this paper will focus on identifying variables from the vantage point of the users, especially those variables which seem to increase the probability that the process of developing an IEP will result in a disagreement between the school system and the parents, such that it is likely to go to an appeal. The variables proposed were distilled from experience in interviewing and observing persons who have been involved in the appeals system (parents, school officials, hearing officers, lawyers, and advocates). These experiences sensitized us to useful variables that we shall present below within the broad context of the total system of due process safeguards.

This paper will be presented in several parts. The first section discusses some introductory considerations relating to the implementation of the activities related to notice and consent, and to legal procedures, more generally, within the context of an educational system. The second section presents a schema for conceptualizing the response of users to a procedural safeguards system, seeking to identify structural and process variables that are hypothesized to influence whether a parent will resort to an appeal. These considerations were derived from our observations and study of the users' experiences with procedures established to meet the due process appeals requirements in special education. The third section sets forth a schema which describes the sequence by which new special education requirements are implemented. The fourth presents a grid of requirements for notice and consent and some variables related to these requirements, seeking to integrate considerations derived from the perspective of the total due process system (Section 2) and the schema describing the sequence of implementation (Section 3).

The thrust of this paper will not be on the legal statements of rights but on procedures that seek to determine whether, and under what circumstances these rights may be exercised with their intended effects. Little attention has been paid to this problem because extension of legal rights has concerned advocacy groups for the handicapped and mentally ill and their legal counsel; it has not yet attracted substantial social science interest. Our attention is directed toward the experiential considerations involved because rights of parent and child have raised questions regarding the gap between intent and its realization.

Overview

There are tensions of some significance, potentially, when one seeks to reconcile the positions of parents and schools in reference to mandated requirements. An example may illustrate the tension. The notice and consent requirements confront one with issues of completeness of information conveyed to parents regarding their rights. Lawyers who framed these requirements have a threshold different from that of education professionals in comprehending legalistic language which sets forth obligations of the LEA and the rights of parents. The disparity is usually greater between lawyers and parents. Lawyers are obliged to document instances of malfeasance in order to press school systems that have not performed in accordance with the law. Their concern is that the necessary documentation be available if such suits should develop.

To meet these requirements, and aware of the possibility of lawsuits, LEAs may develop comprehensive notice statements detailing the rights of parents and obligations of school districts that are overly long, and phrased in legal language. These often intimidate the parents, and too often, produce a negative or non-response. Parents may feel the process too demanding. They do not want to get involved in what they do not understand, and the elaborate notice statement produces more problems than it may seem to solve. The salience of their children's problems appears to fade in the effort to protect themselves from what appears to be legal entanglements. The intent of the law is thwarted because the children who require the special services cannot be approached without some added difficulty.

For schools, an overly legalistic approach is difficult and inhibits the school's response to the child's needs because the staff becomes obsessed with meeting the requirements and cannot muster the added energy to imaginatively address these needs. Several Massachusetts special education administrators have estimated that one-third of their staff time is engaged in meeting the requirements for documentation. Contrary to popular myth, we do not know in a formal communicable sense how most effectively to address many special needs of handicapped children, especially those most in need of services. This is one reason they have been inadequately served. Good individual practitioners often know, but they need maximum administrative support to be creative and responsive in their programming. An overly legalistic system saps this creative energy into form-filling work that is often programmatically meaningless. It reinforces the inappropriate posture of compliance, rather than eliciting imaginative responsiveness to the needs of the child. But without documentation requirements to ensure that rights of parent and child have been addressed properly, we cannot identify noncompliant LEAs and hence cannot assure responsive address of these rights. This Scylla-Charybdis dilemma is difficult to navigate.

The challenge is clear. State and Federal agencies must formulate policies regarding implementation of the requirements that will provide the minimally required documentation but will also foster practices that make practical and psychological sense from the vantage point of the LEA and the parent-child consumer.

We can suggest several types of strategies for meeting the notice and consent requirements in this response within the constraints imposed by the P.L. 94-142 regulations. For example, one might investigate the impact of practices that have multiple intents – e.g., to provide the necessary notice and obtain preliminary consents, but within the context of a personal relationship that is fostered with the parents by school staff. The personal contact initiated to notify the parent of the proposed procedures can initiate a relationship that continues throughout the evaluation and IEP formulation process, providing an avenue for the parent to develop an informed sense of the school's direction, intents, and efforts, involving them in the process, ultimately resulting in a constructive relationship that provides not only the basis for the legal requirement of informed consent, but also for a close working relationship between the parents and the school during the period when the child's program is being implemented.

What is critical is to recognize this tension between meeting legal requirements and psychologically sound practice which can help the schools meet the intended purposes of the Act, not merely comply in a technical sense with the stated requirements of the Act. It is with this central concern that we propose to address the tasks set forth in this paper.

Following a brief discussion of the legal context and requirements of due process, the variables for maximizing the potential of a due process system in human experiential terms will be presented. The major question posed in our study was whether parents and children intended as beneficiaries of the legislation and judicial decision mandating procedural safeguards to assure rights of the handicapped would exercise these rights and how they would come to understand the experience. This approach was developed to help us better understand how the system must be constructed to assure that the intended beneficiaries utilize opportunities accorded them when they feel they have a legitimate grievance.

A Brief Legal Joust with Due Process

In general terms procedural due process embodies principles of orderliness, fairness, and respect for the rights of the individual. More specifically, due process requires that an individual faced with state action threatening basic rights has the right to be informed of the imminence of such action (right to notice), to have assistance in defending against such action (right to counsel), to present evidence and question those presenting evidence regarding such action (right to hearing) and therein to confront and cross-examine adverse witnesses and have impartial review of such action (right to appeal).

The due process clause derived from the Fourteenth Amendment guarantees that "No state shall . . . deprive any person of life, liberty, or property, without due process of law." The basic meaning of this clause is that fair procedures must be followed before a state can deny certain important interests of individuals. In a substantial number of decisions, the Supreme Court has indicated the kinds of interests important enough to invoke the protection of the due process clause. The Court has also specified those protections in various contexts. Supreme Court decisions most relevant to the application of due process to special education have been discussed by Kotin and Eager (1977).

Although certain traditional procedural safeguards have become associated with due process, that concept does not have a fixed meaning. As with other personal rights protected by the Constitution, the right to due process is premised upon the normative, philosophical idea of *procedural fairness*, but practical application requires that it be a flexible concept, adaptable to each new context to which it is applied. It must be sufficiently flexible to be applied to diverse interests of individuals faced with a criminal or juvenile accusation, discharge from government employment, suspension from public school, revocation of a motor vehicle license, denial of a welfare benefit, attachment of property, or loss of another important interest defined by the Supreme Court within the meaning of "life, liberty, or property."

These areas of due process application share three elements: state action against an individual or class of individuals; threatening of interest in "life, liberty, or property," and a dispute between the individual and state concerning the validity of that threat. The purpose of the due process clause is not to prevent denial of individual interests by the state, but to ensure that such denial will occur only after rational criteria are applied in a rational manner. Facts must be proven through a process guaranteeing to the individual whose interests are threatened, an opportunity to challenge adverse evidence and argue that the interest should not be denied. By *fairness*, in the context of the due process requirements specified in P.L. 94-142, we mean that the required procedures are intended to ensure that certain types of consultative contacts are effected to achieve at least a minimal communication of intended actions at specified points in the school-parent-child relationship. But by extension and implication, mandating these requirements indicates that fairness be viewed more broadly in its psychological-interpersonal implications as indicating a qualitative standard for the communication that should occur between the parties.

It is with the conditions required for the assurance of procedural fairness at least in the areas of notice, informed consent, and in the processes associated with dispute resolution that this paper is concerned.

While schools have perceived these safeguards as indicating bias against them, it is our contention that the procedural safeguards were explicitly mandated because of school staff's longstanding difficulty in defining acceptable program standards for handicapped students, and accepting a positive and involved participant role for parents, especially in light of the requirement of informed consent by the parents to the IEP and full services program proposed by the LEA. While schools and parents have deplored the stress on the adversarial posture of the hearings appeals proceedings, this model is not the necessary or only avenue for dispute resolution. It is likely to be the *worst possible choice* for resolving educationally based disputes because the conflict engendered by the adversarial posture will negatively influence the long term relationships that schools, parents and children are involved in, too frequently alienating the parents from further involvements with the school's programming, and necessarily causing them to seek repeated and continuing appeals of schools' attempts to re-integrate their child into the school's program. They simply do not trust the efforts of the school after the acrimony engendered by the adversarial dispute.

The key consideration is that, unlike the usual administrative or judicial proceedings, e.g., rent control disputes, the tenant can usually find another apartment. Education involves a long term continuing relationship between the parents, child and school, and one must be concerned with the long-term sequelae of the conflicts engendered by any dispute. The adversarial hearing model appears to create patterns of negative relationships between parents and schools in many instances that may adversely affect the long-term development of the handicapped child. Some parents even complain that mediation proceedings are experienced as sources of pressure by the state mediator to concede their demands to the school-proferred IEP.

The primary concern of this paper, then, will not be on the legal statements of rights but on procedures that seek to determine whether, and under what circumstances the rights to notice, informed consent, and to an appeal may be exercised with their intended effects. Little attention has been paid to this problem because the extension of legal rights has concerned advocacy groups for the handicapped and mentally ill and their legal counsel; it has not yet attracted substantial social science interest.

It is in the spirit of trying to understand the complexities involved in realizing the intended benefits which transcends the mere mandating of rights that the following schema is offered for public discussion. It is proposed as a schema, since it feels too raw to be a model.

CHAPTER I: A SCHEMA LISTING THE VARIABLES RELEVANT TO THE OPERATION OF A DUE PROCESS SYSTEM IN SPECIAL EDUCATION.

The following section presents the major variables which are hypothesized to mediate the responses of participants to the operation of a due process system in special education. The variables identified have been derived largely from the experiences of parents who rejected the proffered IEP and utilized appeals for resolution of the dispute with the school district, and RIEP project staff who observed and studied the operation of a centralized due process system (Massachusetts). In considering these variables, we shall distinguish five stages in the due process system:

1. Identification, referral, and evaluation of the child up to the development and presentation of the individual education plan (IEP).[1]
2. Acceptance or rejection of the IEP, involving the concept of informed consent.
3. Preparation of the case if parents reject the IEP.
4. The appeals proceeding, resulting in a decision or agreement (hearing/mediation).
5. Follow-up to ensure compliance with the outcome of the appeals proceding.

The first four stages in this progression are required by statute and regulation: the last is proposed as necessary add-on procedures if intended benefits are to be realized. Interviews with parents two years after a decision was rendered indicates a significant fraction who claim the decision of the appeal has still not been fully implemented. It will not be further considered in this document.

Five general categories of variables are proposed, three of which have broad ramifications for the total due process sequence; three follow recourse to an appeal.

I. Categories of Variables

A. Mandated Legal Requirements

The mandated requirements identifies factors which address those variables which are required to meet the procedural safeguards as stipulated in P.L.

---

[1] It should be noted that this plan is viewed as having two components: first, a plan which presents the child's identified needs, the short and long-term objectives, and the services required to meet these objectives; second, the specifics of the program designed to meet these objectives.

94-142, although they may be further elaborated in state statutes and regulations which go beyond these requirements. They must be considered from the time of referral for evaluation and throughout the appeals proceedings.

Required Federal and state procedures, specified in legislation and regulation, provide that all special needs children be identified, appropriate evaluations made, placement options generated and an appropriate education be provided the handicapped children at no cost to the parents. They involve necessary outreach procedures, providing notice to parents and obtaining their consent prior to evaluation procedures, rules for school conduct of the evaluation, development of an individual educational plan by expert child evaluators, teachers, and related personnel, resources for special educational programs (including those mainstreaming special needs children), parental notice and informed consent following development of the IEP, and provisions for monitoring handicapped children's progress.

Within these requirements we have identified three subsets of requirements of particular significance to a due process system in education. These are:

1. Requirements for parental involvement in evaluation and IEP planning;
2. Parental access to information regarding the child's special needs, current status, and progress in various competency areas and past educational programs; and
3. Rules relating to conduct of appeals proceedings.

A.1 Parental Involvement

The purpose of these requirements is to provide maximum opportunity for parent and child to be actively, rather than passively involved in the information-gathering and decision-making process. To broaden the base of decision-making, procedures are specified for informing the parent of the need for action early in the process of the referral, during evaluation, IEP development, and later monitoring of the child's progress. Awareness of opportunity is clearly required for the utilization of the opportunity. Active involvement means that formulation and monitoring of the appropriateness of the IEP must involve parents at some level of parity with the contribution of school representatives.

Sample requirements from the regulations for P.L. 94-142 include the notice and consent requirements, which will be addressed more specifically below, participation in developing the IEP, and attendance at the meetings at which the IEP is formalized and/or revised (121a, 344-45). The latter section details the documentation required by the schools indicating that they did expend energies ensuring that the parent would attend these meetings. The intent is clear. Parents must be involved in this process or schools must demonstrate that they did try to involve them. Throughout the process of the parent-school interaction, the schools must provide an interpreter for the non-English-speaking parents, and materials must be sent to the non-English-speaking parent in the language of the home (e.g., 121a, 505cl).

2. Parental Access to Information

The purpose is to provide parents with access to information relevant to their child, access to the school's evaluation materials and the understanding of how one navigates the appeals system when necessary. Furthermore, the opportunity for adequate support, counsel, and experts allows parents and school systems to present the best case from their points of view. A system in which all parties have the same opportunities but not the same access to information and support is not equitable. Procedures for achieving equity involve physical and knowledgeable access to information, and fiscal support for this effort. Procedures should include access to information without prohibitive costs, and low-cost legal, educational, psychological, and medical advice by independent evaluators of the handicapped child.

Schools are obliged to provide the following kinds of information upon request of the parents under P.L. 94-142:

a. Copy of the IEP (121a, 345f).
b. Opportunity to examine the child's records with respect to identification, evaluation, and educational placement of the child, and provision of a free, appropriate public education (121a, 502).
c. Availability of independent evaluations of the child at public expense if the parent disagrees with the evaluation obtained by the schools, subject to some restrictions (121a, 503).
d. Availability of any free or low-cost legal and other relevant services in the area, if the parent initiates a hearing (121a, 506).

3. Rules Governing Appeals Proceedings

Regulations for P.L. 94-142 specify some minimal features of the appeals procedures, restricting themselves to the adversarial hearing format. These may be summarized as follows:

The hearing must be conducted by the SEA or LEA, depending on state regulation or practice (121a, 506b), by an impartial hearing officer whose selection criteria are defined by exclusion in the regulations (121a, 507). Appeals of the decisions rendered may be made by either party, and these may be conducted through several levels, depending on the state, until brought to the Federal district courts. Rules relating to conduct of the hearings are not specified, except for procedural rights of parents, as described earlier for impartial hearings (e.g., right to counsel, presentation of evidence, confrontation, cross-examination and subpoena of witnesses, receipt of transcript, and prompt decision (121a, 508, 512).

Many factors unspecified in the regulations may influence the manner in which hearings are conducted. For example, the common assumption among special educators is that the judicial model is the model of choice. In fact, hearings under these provisions are conducted in accordance with rules relating to administrative proceedings. The rules by which administrative proceedings are conducted are very flexible, and there is a very wide latitude in the manner in which the hearing officer may conduct an administrative proceeding. For example, rules of evidence typical of court proceedings are usually not operative.

If one includes less formal conflict-resolving procedures (e.g., mediation), the latitude in behavior of the appeals officer is even greater, since rules for conduct of these procedures are relatively undefined, formally, in legal practice by contrast with the judicial model, increasing the problems of assuring impartial proceedings. While other models for dispute resolution may be utilized, only recently has mediation been recognized as a more informal approach than adversarial hearing (See Comment in Regulations). There are other models that may be applicable to the process of dispute resolution.

Factors influencing impartiality in appeals proceedings include rules for the conduct of these proceedings and the characteristics and style of the individual appeals officers. These represent considerations beyond those mandated by the Act's minimal requirements and are major sources of variation with respect to assuring fairness among states, within states and among appeals officers within states. Little or nothing is known about these factors but they obviously can affect the appearance and the reality of impartiality. Even within the context of relatively well defined practices within the courtroom, there is considerable room for "human error" in the outcomes of judicial proceedings, due either to the individual differences among judges, and/or the vagaries of group processes within juries. Clearly what's required is extended study and explication of the variables that can lead to better understanding of the factors which contribute to undermining the impartiality of the dispute resolution process, regardless of the model employed. In turn, through regulation changes or "good practices" guidelines there can be altered procedures recommended to LEAs, SEAs, parent consumer groups and other interested parties.

The nature of the decision/agreement, the product produced from the hearing/mediation proceeding, is unspecified; considerable variation exists in format, degree of specificity, and justification for conclusions and recommendations for programs. This issue will be discussed further below. In the context of this presentation, unspecified legal requirements engender practices by states or LEAs which may or may not meet the intents of the Act.

As an added feature, we propose consideration of the importance of specifying follow-up procedures as a mandated requirement of a due process system. In Massachusetts, this has become a matter of some concern to parents who often claim that the decision or mediation agreement was not implemented by the LEA. If the particular dispute required formal or informal adjudication, it is important to build in provisions designed to ensure the results of the procedures are implemented. This can be initiated by parental complaint; but the greater the burden placed on parents for initiating action, the more likely that this will not happen — especially in the aftermath of an appeals process that is so demanding of participants' energies and psyche. What was revealed by our follow-up interview data is that many parents do not indicate a sense of real satisfaction. Even after they "win" their case at the appeal, they cite the failure of schools to act. What must be considered as a routine requirement is a set of follow-up procedures which can ascertain whether the decisions or mediation agreements were implemented. Conceptually, this follow-up procedure parallels the requirement for annual monitoring of the child's progress in his educational program. (IEP).

What should be clear is that legal requirements, per se, cannot and do not specify practices by states or LEAs to ensure impartiality in resolution of disputes, and products that will ensure equity and understanding by the lay person parent. A clearer understanding of the practices, or their failures that produce unintended effects, must be developed by social science research efforts. This knowledge can maximize the intended effects involving parents intrinsically in the education and training of their handicapped children. Hopefully, these experiences and this know-how now oriented toward the handicapped can be transferred more generally to the operation of the educational system for all children, a sentiment that has attracted much rhetoric, but little operational performance until the requirements of P.L. 94-142 were legislated.

D. Parental Variables

In addition to parental right to involvement and access to information as required by state and Federal regulations, the following parental variables or clusters of variables (factors) are hypothesized to be pertinent in considering the response to the notice, granting of consent, providing informed consent, and pursuing dissatisfaction with the school's IEP to an appeal.

1. Family values regarding educational and occupational goals for their children, their conception of the school's role in fulfilling them, their expectations for their handicapped child; parental education, family income, socio-economic status, etc.
2. Prior history of contacts with the school, especially in trying to obtain appropriate services for their handicapped children. One must usually consider as part of the "history" the manner in which the schools responded to the special education needs of other children in their nuclear and extended family, and/or, community. By generalization, one can posit a number of variables that may be subsumed under a construct "school reputation for responsiveness," i.e., the extent to which schools are perceived to be

responsive to the needs of handicapped children. Information related to the variables included in this construct may be derived from the personal experiences of a family, and/or the experiences of neighbors, friends and parent groups in the community.

3. The nature of the child's special needs, potential complexities involved in diagnosis, service provisions, or program placement options.
4. The nature and quality of early contacts with school personnel and those throughout the current contact, starting with the referral for evaluation (e.g., relating to notice and consent requirements) and continuing through the involvements in the evaluation and IEP formulation process. The nature and quality of these interactions crystallizes an expectation that the offerings ultimately to be proposed by the school can or cannot be achieved with at least moderate success. If these interactions with school personnel are viewed as unresponsive inclining the parent with sufficient psychic, social, and financial resources, to distrust the school's efforts, and ultimately reject the IEP.

We hypothesize that the critical constellation of variables that represent the core intent of the due process safeguards relates to the quality of the parent-school communication process. The legislation specifically requires parental involvement throughout the program planning process, and we have frequently heard from parents that when their experience with schools is negative and unresponsive, they tend to reject IEPs and launch costly appeals. Parents consistently say they do not enter the process with the intent to appeal, but the appeal results from the school personnel's "misbehavior". This confrontation, in turn, alienates the parents from school personnel with whom they must deal during their child's subsequent school career.*

Some other variable groupings can be subsumed under this parent-school communication construct. Such variables as "skill, openness and candor in the evaluation process"; "responsiveness of school to parent involvement, especially those which are parent-initiated"; "number, type, and quality of school-parent contacts" (e.g., degree of satisfaction); "prior history of family with problems of handicapped children within the LEA" relate to parental trust evoked from school contacts and fall under the rubric of this construct.

If trust is initially evoked in this interaction and can be maintained, our observations and interviews suggest that it is likely that parents will not resort to appeals without a willingness to compromise, unless they want options not

---

*See Budoff and Orenstein, Chapter entitled: "Parental Response to Involvement in a Due Process Hearing," *The Human Response to Involvement in Due Process Hearings*. Research Institute for Educational Problems, RIEP Print Number 107 (1978).

clearly required for their child's continuing progress and which are expensive for the LEA, e.g., private school placement. What is clear is that the early contacts around the notice and preliminary consent requirements may be crucial in encouraging a parental perception of the school personnel as caring and interested, and a sense that they really want to help.

By contrast, a pattern of unresponsive, condescending, misleading, or dishonest communication with parents regarding their child's needs will alienate parents. Given sufficient anger, concern with their child's situation, and familial, psychological, and fiscal resources (or its surrogate, support from their community), these parents will reject the proffered IEP and pursue appeals. Honest, concerned communication by school staff will dramatically diminish the incidence of confrontations resulting in IEP rejections and appeals and also ensure more positive parental involvement in the school's efforts. This process can be documented in several communities with case studies, but its frequency of occurrence is unknown.

More than ever before, parents are angered by the pretense of school systems to capably deliver certain programs. These parents indicate that had the school acknowledged their shortcomings and attempted to upgrade the quality of services, the parents would not have confronted the schools and requested a hearing for private school placement.

Dishonest school communication raised their doubts about progress to be made within the public school program by their child and thus forced the parents to resort to extreme solutions to their problems.

A key issue, and a particular test of the central construct "quality of parent-school communication" is the urban parents, more generally, and especially those from low income/minority group backgrounds. In the more general case, urban systems have generally been less responsive to parents, more closed to a responsive communication process than suburban systems. However, all LEAs appear to have difficulty with these problems.

Even within a progressive state educationally, Yoshida, Fenton, Maxwell and Kaufman (1977) report that while the IEP planning team (PT) members' attitudes suggest support for a rather limited parental role in the process of formulating the IEP, "parents are expected to provide information to the PT, but they are not expected to participate actively in making decisions about the school's program." (p. 11) Thus, while the Connecticut regulations required that schools invite parents, the school personnel tend to limit the role of parents to information providers rather as contributors to the decisions about their child's IEP, as is clearly the intent of P.L. 94-142.

The situation of the low income/minority group parents is more difficult than the middle class parents in these LEAs since these persons have much fewer resources with which to understand the complexities of P.L. 92-142. Low income persons are usually less well educated, may have language problems, and probably different ways of conceiving of the problems of their child than the school personnel. More particularly, they may have a different sense of their child's capabilities and potentialities as an adult, and these may not include occupations related to good school performance if the child has had early difficulty learning in school. For example, there is evidence that when children of medium and low income backgrounds achieve poorly in the primary grades, their parents do not expect them to perform well as students, and do not provide them with the supportive reinforcing relationships that they offer their "student"-children (Kahl, 1953). While the school may consider the poorly achieving child eligible for special education services, the parents may not perceive the problems as requiring the degree of involvement that was warranted. Too many of the children and adults in their own experiences have done very poorly in school. Why should one expect this child's situation to be reversed if they expend the considerable efforts required to become involved in the child's school programming?

The parent expectation data notwithstanding (Rosen, 1964), it would not be surprising if the parent of the low income child simply did not feel that the child's academic status can be altered by the intensive and demanding involvement required by schools under P.L. 94-142, especially when the contacts are developed within the formal legalistic framework that urban systems are likely to utilize to be certain they are in compliance with the requirements. The parents' experiences of considerable school failure in their own (often) and their friends' and relatives' school careers might well act as an obstacle to considering the child's needs for special educational services since school failure within their life experiences is "normal" for many persons. The schools' tendencies to be alienating merely reinforces the sense that this particular child will simply not ever be a "student." The parental response may be different, however, if their child is substantially handicapped, and the requirements for help are more clearly discernible. Even in these circumstances, however, it is unlikely that these parents will press the schools for the most appropriate program, unless provided with considerable outside support.

C. School-Related Variables

Defining the "School System" for the Parent

A particularly complex problem is the definition of "school system" in terms of the persons with whom parents interact particularly during their involvement in the sequence of activities that results in the IEP, where the issue of informed consent becomes most critical. One can identify four types of actors in public schools with whom parents may come into contact, each with a different relationship to the policies of the system, especially as it would be enunciated regarding the specific program needs of their child. These may be categorized as *central office administrators* (e.g., the superintendent, director of special education or pupil services) *building administrator* (principal), *child evaluation personnel*, and *direct service providers* (e.g., regular and special educators, and remedial and instructional specialists). These different types of role occupants are uniquely related to the parent and may present quite different perspectives of the LEA's viewpoints and recommendations. Central district administrators may be more directly concerned with issues of budgeting and general procedures and policies, with little acquaintance with the specifics of a case unless and until difficulties arise which may require extra-ordinary actions.

By contrast, direct service providers may have a closer, more intimate understanding of the child. Depending on their perception of their operating space,[*] they may advocate programs that represent their perceptions of the child's practical needs, which may be contrary to administrative policy. In this continuum of familiarity with the particular handicapped child, the principal and child evaluation personnel occupy intermediate positions.

The principal, if he/she takes an orientation as "educational leader," can have some sense of the child and his needs from direct contact with the staff and child over a period of time. But the alternate posture of business manager/president represents a stance that suggests distance and unfamiliarity, except in a passing sense, with the child as a person and learner. Gross and Herriot (1965) have pointed out the dramatic differences in the operational characteristics of schools as a function of the role the principal assumes. Regardless of role, the principal (unlike central office personnel) may assume direct programmatic responsibility for these children and is likely to meet and interact with the handicapped child's parents. Two factors – concern with allocation of scarce resources and personal interactions with the child's parents – force the principal into a familiarity with the circumstances of the handicapped child and his/her programmatic needs to a greater degree than would be true of central office administrators, except for the special education director. However, principals vary considerably in their willingness to assume responsibility for the programmatic needs of the handicapped children in their building – a situation that characterizes the orientation of general educators.

---

[*] The term "operating space" is used to denote the degree of latitude and initiative that teachers display in their work with children, their contacts with other staff members, and even the latitude given them to consult with school staff outside their buildings or in non-school agencies without administrative permission. Operating space, operationally defined, may relate to the freedom of responsive interaction displayed by teachers and specialists in their interactions with parents. One might expect that in buildings tightly controlled by principals, the expectation that staff must "ask permission" should inhibit this interactive exchange (i.e., the staff perceives less "operating space").

The stance of the evaluation team members who develop the data from which the IEP is formulated and the direct service provider staff who must implement the child's program may also differ considerably toward the parent. If the evaluation staff are based within the child's building, they may have considerable information about the child's functioning that is residual among his/her teachers and may develop views of the child similar to those of the teaching staff. If they are not based in the child's building, their familiarity with the child may be developed through test data and reports, and these yield very different perceptions of the child's needs and capabilities. The program proposed may also be difficult to implement, since it may not recognize the capabilities and limitations of the building staff to which the child is assigned. This independence may be viewed as positive because the evaluation team is taking an independent look and prescribing a program that may be individually tailored to his needs. But the proposed program may also more frequently be responsive to the policies and limitations of the special education resources available to the department in its programming recommendations rather than what is appropriate to the individual child.

The child evaluation team (CET) coordinator, who is the team member frequently communicating findings to the parents, is in the most equivocal position, especially if the person is responsible to the central administrator. Even if desirous of advocating for the child's program needs, the CET coordinator represents the central office and must formulate programs for handicapped children consonant with policies and constraints of the central special education department, though school systems vary considerably in the latitude they permit staff to meet the particular needs of handicapped children.

The range of role variation among school staff is critical in defining parental perception of the school vis-a-vis their child's special needs, and services required to meet those needs. Parents who have had a great deal of experience with one role member of the "system" (e.g., teacher) may develop different perceptions of their child's needs from parents who have had an experience with another role member (e.g., principal or special education administrator). Under these conditions, different relationships and sets of mutual expectations emerge.

In the context of this RFP, these issues become critical since who manages the notice and consent systems, modulates the level at which the parents experience the system, the personal understanding and commitments the system's personnel will engage in, the parents' sense that the system is trying to meet their child's needs, and the specific quality of personalized understanding of the particular child that the system's personnel convey as they seek to involve the parents in the evaluation and IEP development process. We have argued above that building a sense in the parents of the school's understanding, concern and respect for the child's needs and the parents must be intrinsic to the engendering of informed consent and subsequent cooperative participation in the child's programming. While this is subject to empirical test, so is the hypothesis that the locus and manner of managing the contacts with the parents becomes critical in maximizing the quality of the contacts, another feature required in our view, to assure parental "informed consent."

In considering variables germane to the school's activities during the identification, evaluation and IEP formulation stage with regard to providing notice and obtaining consent, one must consider the institutional structures of the LEA and the schools within them, since the organizational structure can influence the system's response to the child-oriented requirements of the Act.

Other specific school-related variables proposed are:

1. *LEA Structure*; its organizational features e.g., degree of centralization versus decentralization; size i.e., urban/suburban/rural, SES composition of its community and student body; and community-historical-contextual variables reflecting the LEA commitment to serving the handicapped; structure and organization of pupil personnel and special education services (e.g., with regard to organization of child evaluation teams, IEP development, transmission of information to parents), extent of budgeted resources, as reflected in its variety of programs and experience with handicapped children and prior response to change.
2. *School Structure*; level of staff training, experience and quality, and the staff attitudes toward programming for handicapped children.
3. *Child Evaluation Team (CET) Skill and Strategy*; The skill and strategy of the child evaluation team (CET) is critical throughout this process, once referral has been made and the consent granted for evaluation. The manner in which the parent is involved, the respect accorded the information provided by the parent, attempts to elicit the parents' sense of their child's difficuties, helping the parents cope with their guilt and/or anxiety about their handicapped child, and how the parents convey acceptance of the child's handicap are among the factors which can constructively be addressed with the parents in the school's efforts to program appropriately for the child. It is during this set of involvements that the prior community based reputation of poor responsiveness to parents may be reinforced, or modified to convey more accepting, positive, respectful and constructive roles for the parents.

It is suggested below in the more specific discussion of variables related to notice and consent that parental contacts at these early stages can begin a relationship that can be elaborated during the evaluation – IEP formulation process with several saluatary effects:

a. Convey an understanding of the school's goal that are embodied in the IEP, such that the parent understands and approves of them, thus minimizing subsequent disagreement and resort to the appeals system.

b. Engage the parent constructively so that subsequent programmatically related contacts are positive and supportive and, when desirable, may lead to extension of the programs into the home for further reinforcement and generalization of what is being learned in school.

c. Alter the parental perception of the handicapping conditions so that they may become more accepting and supportive of the child's efforts and actively propagate a more growth-inducing environment in the home.

In this process, the skill of the CET is critical, and the manner in which the CET handles the larger issues relating to having a handicapped child should ideally be included in its purview, as well as the more straightforward requirements for parental involvement in the evaluation and the IEP formulation conference.

In light of the earlier discussion regarding the differences in the role relationships of various school staff to parents, an additional question relates to the placement of the CET so as to maximize its effective input into the programming process. One would hypothesize that CETs primarily composed of building-based staff meeting in the child's school would understand the child more intimately in terms of his behavior and strengths, rather than focusing on weaknesses which are evident on tests and in past performance records. Centrally-based teams which rely more heavily on this latter type of documentary evidence and test data are less likely to understand the uniqueness of the child and may convey this lack of understanding to parents by prescribing programs that may not accord with the building staff's understanding of the child. The difference may result in a mismatch between the IEP as a program planning and monitoring document and the realities of the child's needs, which are better understood by the clinicians and teachers who have worked with him/her, and with whose perceptions the parents are already familiar.

4. *Resources Available to the Team;* These may constrain the offering(s) proposed in the IEP or may allow them relatively free rein to be responsive to the child's needs. A critical, extremely difficult issue relates to the quality of these resources, since many parents complain that the school's IEP indicates that their child is being offered the same services in a new-sounding package that were unhelpful to his progress in the past. There is suspicion of tutoring and resource rooms more generally. Many Massachusetts parents believe that these disjointed approaches to helping learning disabled (LD) children will not be productive. Many have become convinced that a more coordinated total-school-day approach to the child's difficulties, even in a separate school, seems to yield considerably more benefit to their child. Frequently, then, a disagreement may arise because the CET orients its programming options to accord with principles of least restrictive environment, while parents view their child's needs as requiring a more total-day program – hence, one which

should be segregated for children with similar needs. The differences may not be in the diagnosis of the child's needs or in the services he requires but in the organizational package within which they are delivered, hence the premises each party is working from may differ. These differences may not accord with the CET's personal or professional philosophy(ies), but represent commitments of the CET as required by regulation, most specifically, the LRE requirement.

Acceptance or Rejection of Proffered IEP

The parent-school variables interact most dramatically during presentation of the IEP to parents for acceptance or rejection. This is the critical event in this process. Parents can accept the IEP as proposed or with minor modifications, and the child's program is presumably implemented. ("Presumably" refers to instances of parental approval of IEP when the child failed to receive what the school promised.)

If the IEP is *rejected* by the parents, several paths can be delineated. In Massachusetts there is a thirty-day period during which no hearing can be scheduled for informal negotiations between school staff and parents, and IEP revision. Parents then sign or otherwise approve the revised IEP, after which it is implemented. Or the parent might simply request that the dispute be resolved by state appeals bureau review of the relevant documents. If this is done, the decision rendered will be implemented. Or during this time, the mediator employed by the state appeals agency might contact parents and school staff to arrange mediation of disputed areas of the IEP. Should this prove successful, an agreement is signed by the school and parents; the plan is then implemented. If the parties narrow their differences, these areas of agreement may be presented at the hearing only if the two parties agree, according to Massachusetts practice. The agreement may or may not be adhered to in the hearing. Resolution by any of these procedures results in implementation of the IEP and cessation of the appeal.

Should these avenues for resolution of parent-school differences fail, then the parties would prepare for a formal hearing.

Conflict Between Parents and School System Representatives

Conflict is the critical focus of the major factors leading to adversarial appeals. It is a function of the needs of the child, the extent to which resources are available to deal with those needs, parental objectives and school system goals as expressed by the administrator who presented the IEP for parental approval.

The following dimensions of the conflict are suggested:

1. Conflict about child evaluation findings and the IEP. Differences occur in:
   a. Special needs identified.
   b. Services proposed.
   c. Nature and locus of placement(s) for services.
2. Conflict about evaluation procedures.
   a. Specific procedures/findings.
   b. Extent and quality of parental involvement, e.g., its honesty or forthrightness.
   c. Use of outside evaluation specialists.
   d. Violation of prescribed sequence and time lines for evaluation and IEP development.
3. Intensity of the conflict.

Private school placements for learning disability children has been a major source of conflict between Massachusetts parents and LEA staff, resulting in appeals. Parents insist that the schools have failed to educate their children properly in the past; the problems are reversible, but they must be remediated early in the child's formal school career to minimize their academic and socio-emotional impact. Parents observe that continuing failure harms the child's self-esteem, competence and social relationships. They are concerned with minimizing this damage and ensuring quick and effective remediation. Parents in our sample earlier included their child in school-based arrangements, which they felt resulted in minimal progress. With the coming of Chapter 766, the Massachusetts special education law, they exercised their rights to a comprehensive evaluation. When school recommendations appeared to be more of the same, they rejected the educational plan and requested an appeal.

School administrators typically resent these demands because they feel their programs are effective and are concerned that children with greater handicaps who need considerably more services are entitled to a first call on scarce resources commandeered by the less handicapped. This "raid" on available resources places pressure on the local communities to provide additional resources in a poor economic climate sensitive to public expenditures. Among politicians, the special education law has frequently been cited as a major source of the rapid increase in expenditures by local communities, which are largely unreimbursed by the state. At school district levels, there has been resistance to requested expenditures and pressure on special education administrators to minimize these expenditures.[4]

---

[4] One indication of this pressure is the high rate of turnover among special education administrators. When we sought out administrators in communities involved in appeals to get the school viewpoint of the experience, we found a 50% turnover each year. While some administrators left voluntarily because of dissatisfaction with the excessive paperwork unrelated to provision of direct services and others because they were considered incompetent, many felt that the special education administrator was a scapegoat for rapidly increasing costs required by the special education law, which were unreimbursed to the community.

In such a situation, local special education administrators resist "unreasonable" parental demands, even when he/she has been unable to obtain the specialized personnel required to mount the programs appropriate to the learning disabled children's needs. In at least one community which resisted expenditures required to implement the Law, appeals won by parents of learning disability children resulted in expensive private school placements. The attendant publicity pressured the local school committee to allocate funds to develop the necessary services within their schools. More than half of these children were returned to their local schools after one year.

Another major source of disagreements is a function of the prior discussion of the differing perceptions by school staff of the special needs of the particular child. As a function of the parent's rejection of the proposed IEP, and request for an appeal, the different perceptions of the child's needs held by school staff in the various positions coalesces into a more unitary viewpoint of the school "system." This process of coalescence of the differing views of the child may progress as a function of the parents' increasing resistance to the school's plan, in a reactive posture adopted by the school staff. While the parent may have been unhappy and distrustful of the school efforts during the evaluation, presentation of the IEP may concretize these dissatisfactions. The parent may object that needs that were identified by them or the child's teachers in informal conversations are not addressed in the service program presented, or that the services proposed are more of the same that had not previously resulted in progress. This antagonism, crystallizing upon presentation of the IEP as a formal school system document initiates a reactive process by the LEA administrators, should the parents persist in their disagreements and pursue an appeal.

During the period subsequent to the request for appeal by the parent, the disparate positions of the various types of school staff evident during the evaluation and IEP formulation stage coalesce; the expressed viewpoint of the school system becomes more integrated and relatively monolithic.

Parallel and reactive to parental distrust evolving toward the schools, then, is an evolving school position. Various school staffers may have previously stated different perceptions of the child's needs and the school's capacity to respond to them. By the time the school comes to a hearing, the position is that of the LEA, viewed as a unitary entity with a consistent policy. The school position at the hearing reflects this stance, in contrast to the multiple voices of school staff heard earlier by the parents. This process of coalescence of viewpoint may help explain parent anger that statements made at hearings by school representatives are contrary to those made during everyday contacts with these "street-level bureaucrats" (Weatherley & Lipsky, 1977). This "lying" becomes a source of continuing bitterness as one discusses the experience of the hearing with them later. Parents do not understand the threat to the "system" which is represented by an appeal, and the nature of the school's response to the "threat." Thus the teacher who felt the child needed a program that the school could not adequately deliver testifies otherwise at the hearing, stating that school staff is capable of delivering this program in the LEA. One superintendent confidentially told a parent that he believed in the validity of the claim in the privacy of the men's room that he was contesting in the hearing room. School personnel who testify as witnesses on behalf of the school meet prior to the hearing, review materials on the child, and develop a consistent argument to be pursued as a "system" viewpoint. This can differ from what individual staffers believe and may earlier have told the parents. The position will reflect that of policy-making administrators, rather than those of direct-service providers, especially when issues in contention are costly placements, e.g., a private school.

When upon review at the district level, the test materials, IEP, and other evidence may be felt to be weaker than they might be the schools may present new documents at the hearing to bolster their case. This again results in the parent cry of "foul!" and increases their sense of the difficulty in fighting the "system."

Preparing for the Formal Hearing

Hearing preparation involves two essential features for parents and schools: skill in *organization of their case* and availability of *outside support*. The quality of the parents' presentation at the appeal will be a function of their skill in gathering information, enlisting the aid of experts, and defining goals appropriate for the child. Parent knowledge, their sense of their capacity to influence school decisions, and availability of information (especially during presentation preparation) all influence the outcome.

Willingness to confront school proposals depend on the availability of outside support: the means to afford independent evaluations and expert witnesses (e.g., independent professionals who can testify about the child's capabilities), a lawyer or advocate (e.g., child advocate, public interest or legal service attorney). Both parents and school utilize lawyers increasingly at hearings since they help organize their case, and provide emotional and procedural support during the hearing. If one wishes to ensure the parent's exercise of their rights, these resources must be made available at low cost/or free within the context of regulation, since availability of these resources improves the quality of the parents' presentation and then increases their confidence they can alter the LEA proposals.

School experience with formal hearings has led them to believe that these proceedings are not convened to resolve disputes informally (as they originally thought). They now prepare presentations more carefully by including documents, coordinate testimony of witnesses, and enlist the aid of a lawyer — especially when high expenditures are involved.

Factors Related to Appeals

Rules for Conduct of Hearings

Factors which may bear on the conduct of hearings include:

1. Rules and written procedures. The formal hearing is not a judicial proceeding but one conducted more flexibly according to rules of administrative law. Variations in procedure may result in considerable variance in results.
2. Style. Despite the presence of regulations and guidelines circumscribing appeals officer behavior at the proceeding, there is considerable leeway possible which can influence the appeals officer's conduct of the appeal. For example, appeals officers vary in their level of activity, their beliefs about justice, their style in resolving conflict (derived from professional training and experience), their role perception, and their personal values. While regulations and guidelines of state and/or local agencies may dictate the form and structure of both formal and informal appeals, variation in style, background, conceptions, and beliefs of the appeal officer probably influence the outcome. The variety in role perception is evident even among members of a small cadre who have worked together closely under the direction of the central state agency (Budoff et al., 1978). School officials' perceptions of hearing officers confirm the variability in this group that are, with one exception, professional lawyers.
3. Effects of differences in officer training and background will vary for formal and informal appeals.
4. Locus of initiation of the appeal. States vary in the manner in which the first level of a hearing is initiated and the person by whom it is conducted; an appreciable number of states delegate this to the LEA. While P.L. 94-142 requires state surveillance and provision for a state level appeal, rules governing selection of the person to conduct the local hearing and the rules to be enlisted are left unspecified. No information is currently available concerning selection of local hearing officers or rules of conduct.

Questions regarding these and other issues must also be addressed – e.g., selection procedures that minimize conflict of interest because of close relationships between school administration and local hearing officers; qualification of school board members not employed by the school system to serve as hearing officers; advantages and disadvantages of a single three-member panel consisting of a nominee of the parent, the school, and someone mutually acceptable to both as used in some states, e.g., California.

An interesting issue relates to the education, training, and experience of the hearing officer. Some states use professionals in special education and psychology as hearing officers; others use lawyers. Different qualitative outcomes probably result, although the proportional balance of wins/losses for the parents does not seem to vary across two states (Pennsylvania and

Massachusetts in certain years). Decision content should vary as the lawyer's ability to make specific program-relevant suggestions is more limited than that of the professional psychologist/or educator. We observed that the latter's management of a hearing may be more variable than that of a lawyer. Out-of-district school administrators utilized as hearing officers seem to operate on different bases than the university-affiliated educator or psychologist, since they can easily identify with the viewpoint of the school. Post-PARC Year 1 data suggested that university-affiliated educators and psychologists favored parents in their decisions.

The Massachusetts experience suggests that the lawyer may be more suited to the hearing officer role, while the social worker-psychologist-educator may operate more effectively as a mediator. This role assignment has been established in other states as well (e.g., New Jersey, Connecticut).

For each type of appeal procedure, formal adversarial and less formal mediation, the major concern is with maintaining fairness. To this non-lawyer-child advocate, fairness must be defined within the context of what procedures would facilitate the appeal officer's understanding so that the decision or agreement can help maximize realization of the child's potential. In our present state of knowledge, one cannot know the most correct program for a special needs child. Furthermore, it is highly probable that special needs children will be fit into an existing program with individualized adaptations, rather than having programs constructed for them — as is required by the language and intent of the Act.

What is critical is the need for a clearer definition of the goals and strategy of the appeals officer. The problem is interesting because the dictum of impartiality implies balanced judgment of the case, based upon its merits as presented at the hearing. The philosophy partakes of the judicial model. I would argue that this is an inappropriate model when maximizing the quality of future life of a handicapped child is the matter of concern.

While appeal officers must clearly be neutral and impartial in considering the merits of options for each child, they must also be actively involved in the search for the most appropriate, effective plan for the child. This does not mean that they will necessarily establish a role opposing parental or school perceptions of child needs. Rather, they must primarily concern themselves with the most appropriate plan for the particular handicapped child. For example, the active arbitrator does not limit the evidence presented to that generated by each side. The active arbiter assumes responsibility for building the most complete set of facts possible to meet the appeal officer's obligation to the child, in the event that contending parties do not do so themselves. Procedurally, this requires reconsideration of the evidence prior to the hearing or mediation so that the issues in the case can be understood, and the occasion of the hearing/mediation can be used to collect additional evidence to clarify particular points being contested. Parents may not put forward the case most responsive to the child's needs. Schools propound positions that tend to minimize their costs while offering what they consider to be a reasonable program for the child. In short, I contend that the appeal officer be impartial but favorable toward the child's needs. His conduct at hearings/mediations should be directed toward maximizing his understanding of the issues so that he can recommend the most effective program appropriate to the child's needs.

The Decision

Following a hearing, a decision must be rendered by the hearing officer, "not later than forty-five days after receipt of a request for a hearing. . . and a copy of the decision. . .mailed to each of the parties" (121a512). The decision becomes the operative document which resolves the dispute between parents and school, containing conclusions and recommendations for actions to be taken. We found the nature of this document to be ignored as Massachusetts first sought to be responsive to the pressure of appeals of educational plans. They became a focus of concerted thought when court reviews resulted in the judgments that the transcripts and/or hearing decisions were inadequate. Decisions have been criticized for vague phrasing and ill-defined justification for conclusions. Since it is the decision that indicates findings, states conclusions, and defines actions to be taken, its nature and quality must be addressed in any consideration of the appeals system.

Culp-Davies (1974) indicates that there is much litigation involved with adequacy of administrative findings and that judicial decisions on the inadequacy of administrative findings is, therefore, one of the principal tools by which the courts impose their limited control. He lists five practical reasons for requiring written findings of administrative hearings:

1. Facilitating judicial review.
2. Avoiding judicial usurpation of administrative functions.
3. Assuring more careful administrative consideration where findings protect against careless or arbitrary action.
4. Helping parties plan their cases for re-hearings and judicial review.
5. Keeping agencies within their jurisdiction.

Criteria Employed in Making Decisions

Kirp, Buss, and Kuriloff, ***Legal Reform of Special Education Empirical Studies and Procedural Proposals,*** 62 Calif. L. Rev. 40, 138 (1974), make the following points:

1. That the grounds on which a decision must be made marks the intersection between procedure and substance. The decision must be predicated on

identifiable and reasonable criteria, otherwise procedural protection is meaningless. However, wise and reasonable criteria will be of no avail unless the individuals affected by the criteria have procedural avenues by which they can insist that the applicable criteria be fairly applied in their own case.

2. The criteria must ensure consistency in the treatment of like cases by minimizing bias and caprice and be a legitimate basis for governmental action which will affect private interests. This is to enable the individual to show an absence of acceptable basis in law and fact or show a basis for action other than the one claimed.

They emphasize the importance of consistent criteria and predictability, but they also make the point that when the classification of decisions is based only on articulated criteria, valuable flexibility will be lost. The chief problem is to combine flexibility with criteria sufficient to prevent capricious, inconsistent, and unexplained decisions. Kirp, Buss, and Kuriloff identify four types of criteria:

1. Facts concerning the classified student.
2. Facts concerning the school system's capacity to meet educational needs of students.
3. Facts concerning possible disadvantages resulting from special classification.
4. Peripheral facts bearing only indirectly on the classification decision.

They emphasize that the decision must make specific references to controlling criteria derived from statutes, regulations, or prior opinions; they should separate the reasons for classifying a child as in need of special education from reasons for placing him in a particular program. If the existing reasons are inadequate, the opinion should state the changes that should be made and should clearly state the facts, values, or policy changes that distinguish one case from similar cases decided previously. Only if a case contains nothing new should the opinion be reduced to a reference to a prior controlling case. This final point raises the issue of the importance of establishing precedents in special education hearings — an unresolved issue.

Abeson, Bolick, and Haas, in "A Primer on Due Process" (1976), discuss the content and structure of the hearing officer decision in special education appeals. They indicate:

1. That the decision be in writing in the primary language of the home as well as English, and be sent to the parent and education agency involved.
2. The decision must be made solely on the evidence and testimony presented at the hearing.
3. Written decisions should include findings of fact and reasons for them.

In addition, if the decision disapproves of the educational plan, there should be a statement of an adequate educational plan. If the decision approves the educational plan, it should indicate why less restrictive placement alternatives could not adequately and appropriately serve the child's needs.

4. The decision shall include a statement of the procedures necessary to obtain appeal of the hearing officer's decision, including a list of agencies from which a parent may obtain legal assistance.
5. The decision is binding on the parents or education agency, officers, employees, and agents

The written report should include:

a. Statement of the purpose of the hearing.
b. List of all persons attending.
c. Review of all facts as presented by the school system.
d. Specific points being challenged and defended.
e. Review of evidence.
f. Decision.
g. Justification for decision.

The above discussion describes the essential elements of an administrative decision and the reasons for it. The discussion and analysis of the form and content of an administrative decision must be addressed when analyzing administrative decisions rendered in hearings held in response to parental rejection of an educational plan. A number of states with due process machinery instituted in response to P.L. 93-380 have written guidelines to decision writing. In one instance (New Jersey), this includes a model decision which appears overly legalistic in form and language ("hereinbefore," "avers," "prayer," "appellant").

Decisions developed in Massachusetts cases evolved in accordance with the following outline:

1. Introduction
   Preliminary Statement
   Background
2. Statement of Issues
   Summary of Facts
3. Summary of Evidence
4. Findings of Fact
5. Opinions
   Conclusions
6. Formal Compliance Statement

The kind of information placed under each heading varies and is dependent on many factors (how much evidence of that particular kind was presented at the actual hearing, emphasis on evidence of a particular type by the hearing officer, how hearing officer categorized certain types of information).

To look at the rules by which hearing officers make decisions, a detailed analysis of the sections entitled "Findings of Fact," "Opinions and Conclusions," and "Issues" is necessary. In a model decision, the findings of fact will be stated as being based on written or oral evidence presented or elicited. Reasons for the findings of the hearing officer will also be stated. This will more usually be included in the section on "Opinions and Conclusions," which should contain statements of law and/or policy.

A number of other issues must be considered in addressing a decision:

1. *Burden of proof.* The question here is whether this is specifically addressed by the hearing officer in the written decision and/or whether it is an important underlying issue. In Massachusetts, the burden of proof at the hearing is placed on the school. This derives from the character of the legislation, which is aimed at rectifying existing unfairness or inequality — contrary to the provisions of S556(d), where burden of proof in administrative hearings is placed on the proponent of a rule or order. From a preliminary analysis of a number of decisions, it appears that the burden of proof in special education hearings is not firmly on the school and can change during the hearing. For example, in a situation where the school has presented an adequate case and discharged its substantial responsibility, the burden of proof shifts to the parents to show why the school's plan is not appropriate for their child.
2. *The interpretation and use of the words "adequate" and "appropriate."* Federal law 94-142 uses the word "appropriate" and the way in which this is interpreted by the hearing officer is important in evaluating how the hearing officer establishes standards which influence his decision. This is related to the issue of how the hearing officer deals with the quality of the educational plan offered and its likelihood of implementation.
3. *Fiscal issue.* An important issue is whether the problem of fiscal responsibility is addressed by the hearing officer, and whether, it influences the decision. That is, is cost an admissible concern for a hearing officer in developing conclusions? While cost is a major issue in many hearings, its relevance to the appeals officer's decision is said to be not considered in rendering the decision. [See section on the hearing officer's perception of role (Budoff, et al., 1978)].

Compliance or Follow-Up System

As indicated earlier, the due process system requires follow-up procedures to assure compliance with the agreement or the unappealed decisions, if due process safeguards are to achieve their intended effects. This does not require a cumbersome bureaucratic overlay, but simple assignment of *responsibility to* assure the parties that the agreement or decision is being implemented. Should a telephone call not be sufficiently informative, a procedural provision for a visit should be included; if compliance is still poor after negotiation, procedures should be available for convening a compliance hearing.

While provision for compliance hearings now exist in Massachusetts, they are convened only upon complaint by a parent. This places the burden for initiation on the parent – an unfair, additional disadvantage.

CHAPTER II: A DEVELOPMENTAL SCHEMA FOR VIEWING SPECIAL EDUCATION CHANGE

Successful implementation of comprehensive reform legislation such as that required by the Education for All Handicapped Children Act (P.L. 94-142) necessitates systematic attention by special educators to variables influencing implementation. These variables have not traditionally been a concern of special educators, who tend to operate from a clinical model by providing services to children identified as needy. However, to execute the comprehensive full-service requirements of the law in the least restrictive environment requires mobilization of diverse school system resources available in the surrounding community. To mobilize diverse elements of the educational and social service system, clinicians and teacher-practitioners must understand the variables which may influence implementation of special education legislation.

In this section we shall indicate variables influencing adoption and implementation of school programs generally, and then set forth an heuristic schema by which to view the sequential course of implementation for special education reforms. In understanding the proposed schema one must consider positing a final stage with which the central concern is with maximizing the intended individualized program benefits for the handicapped child. LEAs and/or schools within LEAs may attain the higher posited stages for some requirements, but not for others. This proposed schema is intended to facilitate understanding of the course of implementation as LEAs strive to realize the intended special education benefits mandated in the Federal Act. Introducing the concept that intended benefits of implementation are the ultimate yardstick by which to assess success of implementation for each requirement presupposes a major focus on the *quality* of services delivered from the vantage point of the handicapped child and his/her family. The sequence described defines major stages that betoken a movement toward increasing quality. It is our hypothesis that the child is neither the sole nor major focus until the final stage in the sequence.

It is both possible and likely that some LEAs will successfully manifest the elements of one stage – e.g., have all the necessary mechanisms and functioning, yet maintain the essential separateness of the handicapped child from the mainstream of the school's activities, another requirement. In the context of the stages described in the following sections, this school (or LEA) may stabilize asymptotically at Stage 2, never essentially integrating its activities for handicapped children. Technically it may be in compliance when its activities are audited, since there may be some definable times which the handicapped children spend with their non-handicapped age-mates. But the organic integration intended by the law is not attempted, much less achieved. It is this organic integration that raises much difficulty in a practical sense, but which is critical to the desired quality of school experience envisioned by the Act.

This paper, then, identifies variables relevant to adoption of new school programs. Such literature usually deals with innovative programs adopted voluntarily. Implementation of mandated educational change is only now beginning to be studied systematically.

One must consider three classes of variables that may be germane to the implementation of the Education for All the Handicapped Children Act (P.L. 94-142):

1. Those which refer *generally* to implementation of educational innovations.
2. Those which refer more *specifically* to implementation of special education programs.
3. Those which refer to implementation of *specific* special education *requirements* (e.g., procedural safeguards, least restrictive environment, individual education plan, etc.).

Within the first two classes of variables we distinguish 2 categories of variables:

1. Those which characterize the community of the school district and the LEA.
2. Those which more directly characterize the LEA.

Community context variables include size, composition, wealth, and current and historical support for education and/or special education. Variables particular to a school system would include parameters descriptive of its organizational structure, characteristics of the LEA staff, LEA commitments to innovation and past experience with change (see Fullam & Pomfret review, 1977).

Context variables relevant to implementation of special education reforms encompass service priority for handicapped children in the community and LEA, historically and at present: relationships to special interest groups (e.g., parent-consumer organizations, advocacy groups, etc.); overlap of the state's special education requirements with provisions of P.L. 94-142, including consideration of time elapsed since the law's effective date. The longer the time, the more opportunity for the LEA to develop experience with specific requirements of the law. One must also consider the pattern of funding for special education in the state and local community, its timing in terms of the special education reforms, and activities of the state as related to enforcement of the required practices. One frequently finds that state legislatures pass reform legislation but fail to fund it or have educational agencies which do not pursue leadership or compliance-inducing activities.[1]

Variables particular to implementation of special education reforms are priority for special education, the placement of its leadership within the school system, resources available for special educational services, number and variety of special educational services available at the onset of implementation, characteristics of the special education staff, history of special education innovation, and strategies employed in implementing prior special education innovations. One would hypothesize that LEAs which have successfully implemented one or more major reform practices in recent years would implement the additional requirements of P.L. 94-142 more rapidly and effectively. Some practices, especially those concerned with legally defined rights of parents and children, are foreign to the usual operation of schools but may be implemented rapidly in a technical sense under the potential threat of suits. Others (e.g., the IEP or least restrictive environment requirements) are conceptually within the realm of our educational philosophy. While posing difficulties, they may be viewed by educators as less onerous (except for the requirements of documentation and explicitness). Even these, however, are complicated by potential organizational "turf" problems. The implementation of each requirement may reflect a distinctive assortment of variables which govern its implementation within the framework of this proposed schema.

The essential focus of this section, then, is on the elaboration of the process by which one might conceptualize the sequence and pattern of implementation of the special education reforms required by the complex provisions of P.L. 94-142. The following pages describe the course by which these requirements appear to be implemented. The schema is derived from observations of the initial attempts of school systems in Massachusetts to implement a similarly complex and comprehensive reform of special education practices (see Budoff, 1975), keeping uppermost the intent of the reform movement: the provision of a free education *appropriate* to the needs of each handicapped child.

---

[1] Two general approaches to facilitating change can crudely be referred to as the carrot-and-the-stick strategies. In seeking to facilitate voluntary change, one is restricted to "carrot"-type strategies, although the most powerful incentives are probably the desire of the individual actors to accomplish the changes. However, critical problems may arise in institutionalizing them.

When change is mandated by law, the other categories of approaches aptly summarized by the metaphor of "applying the stick" are available, along with the carrot-type strategies. P.L. 94-142 contains provisions for both approaches. Incentives (e.g., preschool grants) are provided, along with a partial assumption of costs by Federal formula grant funds which flow directly to the LEA. "Stick" category options primarily involve withholding funds from the state or conceivably by the SEA to the LEA. But other strategies are possible.

The stages are presented to provide an heuristic which may help conceptualize the pattern one may expect during implementation of specific provisions. The proposed stages are:

Stage 1: Planning the Implementation Effort
Stage 2: Setting the Required Mechanisms in Place
Stage 3: Developing Linkages Between Special and Regular Education, Other LEA Sectors, Outside Direct Service Agencies and Within the Elements Composing an Individual School and Its Staff
Stage 4: Mobilizing the New Organizational Arrangements Within the School Building and the School District to Ensure Child Attainment of Intended Benefits

Stage 1: Planning the Implementation Effort

Hall and Loucks (1977), among others, posit a preliminary planning stage during which time the necessary relationships involving intra- and inter-departmental operations can be delineated and defined. Planning is a logical first step and may well have occurred within many communities during the 1977-78 school year with respect to P.L. 94-142. Promulgation of the regulations came early, and aggressive public education campaigns were conducted and/or stimulated by BEH. Also, a majority of states have passed special education reform legislation that paralleled many of the provisions of the Federal Act. It would be of considerable interest to know how many LEAs availed themselves of this opportunity.

To understand the planning effort, one should survey its comprehensiveness – e.g., the extent to which school personnel from non-special education departments, parents, community agencies, etc., were included, and at what level of input for the final planning document. To meet the full service goals of P.L. 94-142, resources of both school departments and their local and extended communities must be included. Quality of the planning would be indicated by structured interviews with participants in the process, and examination of planning documents – both interim and final operational plans for the mandated procedures and programs.

Stage 2: Setting Mechanisms in Place

Most typically, the special education and pupil personnel services departments are solely charged with responding to the requirements of P.L. 94-142. The burdens are numerous. For example, the requirements for IEPs, both for those being served and new referrals, require massive investments of energy by the special services staff to learn new skills and working styles. Perceived as particularly burdensome are the requirements for documentation and specification of the objectives statements in language readily understood by the parents. As IEPs are written, new services must be organized. These are staffed by special education staff, maintaining the separateness of the handicapped children from their peers. Absorption in these tasks in Massachusetts, where the LEAs were under strong pressure to comply, precluded effective planning and coordination with other departments in the LEA. Activities typical of this period are:

- Operation of special education and pupil personnel departments in relative isolation.
- Development of procedures as staff guidelines for the new mechanisms. Noncompliant procedures are reorganized; informal procedures must be written in accordance with specific formats. Procedures relevant to due process safeguards, nondiscriminatory testing, least restrictive environment, and communication with non-English speakers must comply with Federal regulations.
- Mechanisms to respond to the new requirements are institutionalized procedurally, utilizing special education and pupil personnel staff. They may or may not be written as local guidelines.
- Special education and pupil personnel service staff (with increments, if properly planned) are mobilized to deal with IEP referrals.
- Child evaluation teams tend to be centrally based in the special services offices.
- IEPs are general and non-specific.
- Services are initiated or expanded by special services staff to respond to programs required by IEPs.
- Services currently available within the capabilities of the special services departments are most frequently offered to the child rather than tailoring new program options to the child's needs.
- Educational programming is actually separate for special needs children, despite mainstreamed activity.
- Restriction of substantive in-service training activities to Pupil Personnel Services and Special Education staff (e.g., in writing IEPs, diagnostic/prescriptive teaching) except for orientations of regular education staff.
- Special education teachers retrained into resource room teachers.
- Resource room activities unrelated to activities of the child during his/her mainstreamed time.
- Little coordinated activity or communication between special and regular

education staff who "host" handicapped children in their rooms.

- Regular education teachers verbalize that they have no direct educational responsibility for the handicapped child.
- Failure to develop linkages with human service agencies outside the LEA, except for specialized evaluations (e.g., mental health centers, hospitals, and state human service agencies).
- Narrowing of the comprehensive services mandate by school personnel to focus strictly on direct educational activities.
- Proforma communication with parents, as minimally required. Parental consent is obtained through the mail or personal contacts in isolated single contact sessions, phrased in legalistic language in long, overly complete statements.

Stage 3: Developing Linkages Between Special and Regular Education Departments at LEA and School Building Levels

The focus of this stage is on opening channels of communication. The special education department starts to operationalize the implications of educating its clients in the most normalized school settings. Through this self-conscious effort, special services staff may work to establish linkages with other school system program elements at the central and building levels. The extent to which regular and special education adjustments within individual schools occurs will be affected by LEA administrators. The extent to which LEAs develop conflict-resolving mechanisms to cope with authority conflicts, the types of mechanisms developed, and the strategies that participants use in pressing their claims become critical issues during this stage because of the "turf control" problems involved in allocation of special education resources to school buildings. In developing linkages within the schools, the role and posture of the principal become critical.

Some Typical Activities

- Direct and increasingly frequent interactions occur with other departments at the central level as attempts are made to negotiate agreements involving the handicapped children in their programs. These children begin to be included in remedial reading, Title I offerings, bilingual education, physical education, music, art, shop, and vocational training programs as their needs indicate, or meet program eligibility requirements. Federal Title I regulations may restrict access of these children to Title I programs.[5]

---

[5] When, for research purposes, EMR special class children were distributed without label among their agemates among regular grades, these children appeared in the Title I reading groups. Their segregated peers with similar scores were not assigned to these programs. Assignment of a special education class precluded eligibility for Title I programs in that LEA at that time (Budoff & Gottlieb, 1976).

- Efforts are made by special education staff to develop building-level relationships with regular education teachers. Formal and/or informal communications are initiated as regular and special education teachers start to coordinate their programs for the particular child. For example:
  - Resource room teachers become aware that their teaching efforts should be coordinated with work in the child's regular education classes.
  - Programs pursued in one location may appear in other instructional locations (e.g., resource room programs in regular classes and vice versa).
  - Involvement of principal in leadership roles vis-a-vis handicapped children in his/her school may be more apparent.
  - Negotiation and/or conflict concerning resource allocation as new authority structures are defined for building-based programs.
  - Child-evaluation team utilizes building-based faculty to increasing extent as participants.
  - IEPs become more differentiated in content and recommendations; objectives more explicitly stated; documents more useful as program planning documents for teachers.
  - Communications with parents tend to become less formal; parental contacts may be initiated as part of the notice procedures and sustained throughout the IEP development process.
  - Notices to parents are written in shorter statements, phrased in nonlegal language to encourage their participation and understanding of minimal legal rights and requirements. First contacts are oral with follow-up written materials to help parents understand their rights and school obligations with regard to evaluation and service provisions. The intent becomes development of a communication pattern during evaluation and IEP development so that parents may understand the proposed program.
  - Cultivation of working relationships with human service agencies within the community.

Stage 4: Focusing Efforts About Quality of Programs For Individual Children

Concerns of prior stages are with planning, setting in place, and operationalizing new sets of organizational relationships or linkages necessary to meet requirements of the Act in a technical sense. The hypothecated focus of this stage is with ensuring that developed orginizational arrangements can be focused on benefits to the child. Given new linkage patterns between special and regular education LEA subsystems, the primary concern is with mobilizing new organizational relationships to ensure that the program for each handicapped child is appropriate and achieving its intended effects. One must be cognizant that objectives set forth in the IEP first developed for the child represent first approximations — guesstimates.

Activities typical of this stage are concerned with ensuring the organic relationship of program elements to which each child is assigned; regular and frequent program review, continuing readjustment of IEP, the need for changes, and active, continuing efforts to engage the staff in this process of child review with parent consultation. The major focus is on individualizing program elements for each child, adjusting each element as the programmatic responses of each child dictate. The major question is: Does the individualized program have the desired effects on the child's progress? One might expect the following activities:

- Frequent contacts, both formal and informal, among staffers delivering services to the child.
- Concerted and coordinated outreach to parents with effective communication concerned with the child's progress and problems.
- Greater involvement encouraged and exhibited by parents in school programming and work initiated by school staff to extend appropriate elements of the program to the home.
- Evolution of procedures, both formal and informal, maintaining frequent and careful evaluation of the child's progress (more frequent than the mandatory annual review).
- Development and use of informal mechanisms by which to reajust the IEP and program as closer contact of school staff raises questions regarding proposed changes.
- Close working relationships with community agencies whose services are utilized in cooperative endeavors to meet the comprehensive range of the full-service mandate.

School staff is now attending to child needs operationally, rather than rhetorically, and using the most efficacious means to optimize client learning and living capabilities on their own initiative. This focus reveals a major change in the position of the parent. As commonly viewed by school personnel, the parent moves from an adversarial, coercive, or burdensome relationship to LEA personnel early in this process ("We must offer them so much!" "They are so demanding!" "What do they really know?") toward a stance in which parents are seen as an important source of information regarding their child's needs and capabilities, and their input into the IEP conference actively solicited as part of a general relationship intended to enhance the home-school relationship. Their cooperation is solicited consciously, and active relationships may be encouraged between home and school, especially for severely handicapped children. Whenever appropriate, programs may be extended to the home, with parents or siblings acting as secondary educators.

It should not be perceived that a school or LEA can be categorized within one stage for all provisions or in every building for a specific provision, simply because procedures or guidelines exist. Practices, especially within larger districts, vary considerably across buildings. Many of the processes and underlying attitudes and efforts involved in this reform depend heavily on the staff of a building, its leadership, and the supporting framework within which they function.

One cannot assume that the mechanisms set in place in the first operational phase (Stage 2) have been smoothly integrated and institutionalized into the functioning practice of the LEA at every school. People and institutions being what they are, this will probably not occur; inevitably, tasks conceptualized under different stages in this schema will occur concurrently within the system — even at the same time within a single school building. Since school systems are so variable, some buildings will be further along in implementing some requirements than others. As mentioned, while implementation of some provision may be more advanced (e.g., mainstreaming or IEP writing), implementation of other provisions may not have been planned (e.g., parent surrogate).

Without an effective planning process, the burden for setting mechanisms and procedures implementing Act provisions fall to traditional special education and pupil personnel service departments. This fact reflects the organizational structure of the school district and shows reasonable assignment of responsibility. However, when this assignment is conducted solely as an activity of these units, it accentuates the traditional isolation of these LEA departments. Historically, this isolation has been too real for the special education staff within a school. Reinforcing it by assignment of the sole, as opposed to the primary, responsibility for setting mechanisms in place defeats a critical premise of the Federal Act — the expectation that comprehensive, full-service provisions offered within the least restrictive environment requires active involvement of all segments of the school and community service agencies in providing services to these children. These segments and community agencies should be substantively involved in developing, elaborating, and operationalizing procedures which enable the LEA to be responsive to the Act's provisions. When these activities are conducted solely by pupil personnel staff, the perception that the handicapped children are "different" is reinforced. While mainstreamed, it is done with a sense by the regular education segments that they have no educational responsibility for these students. The process of implementation under these circumstances does not transmit a message of joint or shared responsibility, but rather that these children are still the sole responsibility of the pupil services-special education staff. Recognizing that it is very easy to reinforce this image that the handicapped child is "different," hence that regular educators cannot or do not know how to work with them, one must institute strategies that will break down this stance as early as possible in the implementation process.

One implication of these observations is that there must be an early recognition in the implementation process that continued separation or isolation of pupil services departments working out procedures for implementing the Act will work against the subsequent possibilities of cooperation and coordination. It seems reasonable to assume that the patterns set in motion early in the process of implementation will influence the subsequent working relationships, especially if the early patterns reinforce the general consensus that handicapped children are the primary educational responsibility of the special education staff – not even a shared responsibility.

CHAPTER III: THE IMPLEMENTATION OF DUE PROCESS SAFEGUARDS: THE RIGHT TO NOTICE AND INFORMED CONSENT.

The following sections will examine the requirements of notice and consent, and relate these requirements to the considerations developed in the schema for due process and for implementation of due process reforms.

A. Definition of Notice and Consent.

The following definition appears in the P.L. 94-142 regulations:

Written *notice* which meets the requirements under § 121a.505 must be given to the parents of a handicapped child a reasonable time before the public agency:

(1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child, or

(2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child. (§ 121a.504)

The notice under § 121a.504 must include:

(1) A full explanation of all the procedural safeguards available to the parents under Subpart E;

(2) A description of the action proposed or refused by the agency, an explanation of why the agency proposes or refuses to take the action, and a description of any options the agency considered and the reasons why those options were rejected;

(3) A description of each evaluation procedure, test, record, or report the

agency uses as a basis for the proposal or refusal.

The notice must be:

(1) Written in language understandable to the general public, and

(2) Provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.

If the native language or other mode of communication of the parent is not a written language, the State or local educational agency shall take steps to ensure:

(1) That the notice is translated orally or by other means to the parent in his or her native language or other mode of communication;

(2) That the parent understands the content of the notice, and

(3) That there is written evidence that the requirements in paragraph above, (1) and (2) of this section have been met. (§ 121a.505).

"Consent" means that:

(1) The parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode of communication;

(2) The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) which will be released and to whom; and

(3) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time. (§ 121a.500)

Parental consent must be obtained before:

(1) Conducting a preplacement evaluation; and

(2) Initial placement of a handicapped child in a program providing special education and related services.

Except for preplacement evaluation and initial placement, consent may not be required as a condition of any benefit to the parent or child (§ 121a.504(b))

These requirements are summarized in the accompanying table.

SUMMARY OF MAJOR PROVISIONS REQUIRED FOR NOTICE AND CONSENT IN CONTACTS WITH PARENTS OF HANDICAPPED CHILDREN
(EXCLUDING SEA REQUIREMENTS)

MAJOR PROVISIONS OF P.L. 94-142	*NOTICE (PROVIDED)*	*CONSENT (REQUIRED WHEN)*
Definitions/contents defined	§ 121a.505	§ 121a.500
Identification, evaluation and/or educational placement	when LEA proposes to initiate or change the identification, evaluation, or educational placement of the child (§ 121a.504)	conducting preplacement evaluation; initial placement of a handicapped child (§ 121a.504
Evaluation and IEP development and approval process and annual review	notice of conference meeting to develop IEP, including time, date, place and location, who will attend	if parent refuses consent, see recourse (§ 121a.504)
	documentation of attempts to have parents attend; records of telephone calls, correspondence, visits to home/employment sites	
	communication in the language of the home; language understandable to general public (§ 121a.345)	
Re-evaluation	on request parents will provide information about where an independent evaluation may be obtained	(no parental consent for placement change required) (§ 121a.504)
	parents must be afforded opportunity to examine school records of their child	
	documentation of attempts to have parents attend; records of telephone calls, correspondence, visits to home/employment sites (§ 121a.345)	
Due process hearings	LEA informs parents of low cost or free legal services, upon request, or if LEA or parent initiates a hearing (§ 121a.506)	
Confidentiality of records	LEA informs parent information on child is no longer needed to provide educational services to the child (parent may request destruction of records)	for disclosure of personally identifiable information

BEST COPY AVAILABLE

B. Criteria for Notice and Consent

Criteria specific to notice:

1. Characterizations of the document.
   a. Length of the document (number of pages ______)
   b. Quality of the language
      Everyday legalistic in language content
      Language of notice in language of the home?
   c. Comprehensiveness
      1. Discussion of all parent rights and school obligations as related to the various provisions of P.L. 94-142 and applicable State law and regulations;
      2. Phased series of notice statements keyed to the stages in the process, e.g., specific on evaluation but vague on description of IEP process;
      3. Phased approach with supplementary materials, vague discussion of other rights, elaborated as IEP development and placement progress through personal interviews.
2. Method of delivery
   a. Mail only — certified or registered, receipt requested.
   b. With follow-up personal interview contact (simple telephone reminder does not count);
   c. Mail then follow-up interview or telephone contact;
   d. Interview contact to transmit notice, with or without mail delivery; consent obtained through the personal contact.
3. Locus of delivery and receipt of notice response
   a. Child's school
   b. District office
      1. Principal's office
      2. Teacher
      3. Child Evaluator (e.g., team chairperson)
   c. Central Department Office
      1. Special Education Administrator
      2. Child Evaluator (e.g., team chairperson)
      3. Secretary/when nonprofesional
4. Timing of delivery prior to initiation of evaluation process

Variables Related to Informed Consent:

1. Method of delivery of IEP and consent form.
   a. Mail; no follow-up personal interview contact (simple follow-up telephone reminder does not count)
   b. Mail; follow-up interview contact
   c. Interview contact to transmit notice, with or without mail return

2. Locus of delivery and receipt of consent response
    a. Child's school
    b. District office
    c. Central Department Office
3. Prior history of contacts (e.g., was parent previously conveyed IEP meeting; prior interview contacts during evaluation process)
    a. No contacts except IEP meeting
    b. No attendance at IEP meeting
    c. No prior personal contacts except by telephone
    d. No prior contacts at all except by mail
4. Language quality
    a. Everyday vs. technical jargon
    b. In language of the home?
5. Completeness of information relevant to request whether legal, educational or psychological
    a. Special needs and services stated
    b. Activities contemplated stated
    c. Information or access to records of their child made available
    d. Specificity of consent letters for activities proposed
6. Nature and quality of the communication with parents
    a. Parent perception of the process
7. Number or proportion of parents withholding consent
    a. Reasons for withholding
    b. Parental perceptions of the process of evaluation, IEP development and presentation

CHAPTER IV: APPLICABILITY OF THE SEQUENTIAL SCHEME TO THE NOTICE AND CONSENT REQUIREMENTS

If one interrelates the procedures necessary to meet the notice and consent requirements with the sequential hypothesis regarding the implementation of special education reforms, one might posit the following stage appropriate behaviors/procedures.

Notice

Stage 1. Planning and writing sample documents.

Stage 2. The notice statements are formulated; they tend to be long, comprehensive and legalistic; primary reliance on mail delivery.

Stage 3. Notice is sent in short, pithy, nonlegalistic language, intended to meet the minimal requirements of the law, intended not to discourage but encourage participation by the parent in the system. A follow-up system of parental contacts, augmented by written materials, will be developed to help the parents understand their rights, and the obligations of school systems, in a context intended not to frighten, but to encourage participation in the evaluation and service provision processes. This would lay the groundwork for the evaluation, IEP development process, and obtaining consent for the IEP.

Consent

Stage 1. Planning and developing the documents required to ensure consent, including the documents required under the IEP, arrangements to meet non-English-language provision, etc.

Stage 2. Consent is obtained through the mail or personal contacts, when possible, but by isolated single contact sessions with the parents.

- Communication with parents is formal, conducted largely through the mails; except for the obligatory contacts required during the evaluation, participation in the educational planning conference, and approval of the educational plan, contacts with parents are minimal; focusing on the particular tasks, and not concerned with building relationships between school and parents.

Stage 3. A series of parental contacts are developed, perhaps initiated as part of the notice procedures, which is encouraged and sustained throughout the IEP development process, including the evaluation.

- Parents are seen as part of the evaluation of their child to gain input related to the child's out-of-school behaviors.

- Telephone calls from parents are answered promptly.

- Parents express sense that the school staff is trying to maintain good communication, and responsiveness to their inputs and concerns.

Stage 4. Contacts are maintained especially when the parents feel some personal guilt or concern about their culpability in the child's problems, as well as to gain their input, and have the IEP reflect their interests and concerns. When the IEP is implemented, plans are maintained to keep the parent informed of the child's progress; perhaps, involve the home in extensions of the child's program to out-of-school locations, when this is appropriate, e.g., for moderately and severely impaired children who need extra stimulation, or a steady regimen once initial learning has occurred.

- Parents' sense of the child's progress is repeatedly plumbed as part of the continuing process of readjustment of the child's program.

- Arrangements are developed for consultations with parents as the results of the child's progress are reviewed at monthly or quarterly intervals.

- Changes or adjustments in the IEP are implemented informally via telephone or personal contacts with the parents as part of this rolling assessment.

CHAPTER V: VARIABLES ASSOCIATED WITH IMPLEMENTATION OF DUE PROCESS SAFEGUARDS

Specification of the relevant variables can be developed from the general discussion thus far, and instances cited to illustrate the applicability of a particular concept to issues of notice and consent. Rather than re-raise the specific variables already proposed in the sequential scheme presented, we shall now summarily review major variable categories relevant to notice and consent.

As indicated in the prior discussions of implementation of special education reform, four categories of variables can be identified in considering the implementation stage. Which of these may be applicable in a self-assessment procedure is an important practical issue that should be discussed.

Self-assessment procedures are economically appealing; when completed with the necessary positive intents, they can be as effective in helping a system understand its present functioning level as the majority of independent evaluations. It would seem that this type of process would be most useful when largely descriptive types of data are collected. It would aid the LEA in surveying its operational attainments and current status, perhaps its habitual styles of operation within specific procedural areas. Difficulties arise with procedural problems because of the threat implicit to departments and the persons who may be involved. When evaluations occur, this becomes most critical when one questions whether the procedures employed have the desired or intended effects; e.g., in querying the users of the system. One must be aware of the potential of threat as perceived by the line and administrative school staff. Yet this strategy of querying consumers of a given procedure(s) is particularly important since one must understand how the procedures are actually experienced. It is not procedures which at face value appear reasonable and appropriate that are important, but rather their utility and pertinence in achieving their intended effects. This can only be determined through the manner in which the procedures are experienced by the consumer.

Though the strengths and limitations of a system of self-assessment should be confronted, this paper is not the appropriate avenue. It is critical in the context of this paper, however, because issues relating to due process safeguards refer to issues of parent and child rights, and these must be viewed as rights that may, have, and should result in conflicts with the self-assessors, the school systems. In the public sector there is already enough legerdemain perpetrated by agencies seeking to paint themselves in a favorable light who often distort actuality to extend their hegemony. Data based on supposition or wish is presented as fact, seldom citing the underlying assumptions. At the very least, self-assessment procedure should recognize these problems. This does not constitute a paean for independent evaluations, since these are usually underfunded, and their independence is usually compromised by the operating agency.

In summary, four categories of variables have been described: *historical/community involvement*, a social matrix or context category relating to community concern with special eduational needs of handicapped children; *structural variables* pertaining to social structural characteristics of the LEA and the manner chosen to organize the due process system; *process variables* describing the functioning of the due process system as perceived by consumers and service managers and those peculiar to the system for operating the notice and consent provisions, and *process* and *status variables* relevant to the parents and their handicapped children.

The *historical-current concerns variables* related to special education sets the context within which the community has addressed the needs of handicapped children. It also includes attention to more general features of the community (e.g., demography, wealth, political style and structure). The *social structural variables* relate to the organization of functions relating to handicapped children. These variables will also be related to the more general organizational structure of the LEA (e.g., its size, degree of centralization, etc.). More specifically, with regard to special educational services and functions, one would attend to the degree of centralization of pupil personnel and special educational services, size, staff competence, level of training, orientation toward the continuum of services and working styles required by the Act, the staff's openness to change and its experience with its procedural and behavioral orientation toward the role and participation of parents in the education of the handicapped children.

These variable categories will be developed as part of a larger self-assessment manual, since they describe contextual variables germane to all areas.

Variables relevant to due process and specifically notice and consent will chiefly relate to social structural-organizational variables – namely, the manner in which notice is sent and informed consent obtained. A key variable may be the centralization of notice and consent procedures (e.g., whether conducted from the office of the director of special education or within each of the schools identifying the youngster). We have hypothesized that the key process variables relate to parent school communication. The manner in which this is conducted and the degree of responsiveness to parental inquiry are critical in the intended exercise of parental rights.

The notice process may be relatively straightforward and can be operated successfully from central offices with little or no parental alienation. One critical issue is how the form is phrased and the context in which it is sent so as to maximize, rather than deter, prompt positive response. It is our belief that the subsequent process of assuring informed parental consent to the IEP would be maximized if the notice provisions were conceived as an intimate part of the latter goals, and the initial contacts required by the notice requirements be made personally, so they can serve as the start of the parental relationship.

The consent system may be more critically related to the locus of performance of the evaluation and the IEP formulation process. If administered centrally, with different persons as contacts than the parents have dealt with, or impersonally via the mails, one might posit a smaller proportion of positive responses than if it were administered at the building level – depending on the character and sophistication of the community and the building staff. However, the proportion of IEP appeals or rejections of educational plans is very small, even when the absolute number of appeals sounds large – as in Massachusetts during the past three years. Hence procedures relative to informed consent may not differ significantly in calculable outcome when the most prosaic and impersonal procedure (e.g., mail) or the repeated parental contact approach recommended in this paper is employed. The difference appears in dealing with the issue of *informed* consent. It would be our hypothesis the repeated parental contact approach, our experience suggests, should provide a higher incidence of knowledgeably *informed* consents, but even the repeated parent contact group's expressed understanding of their child's needs and IEP would be far lower than one might idealistically desire. While we would posit that a larger proportion of this group would evidence some substantive understanding of their child's needs and the school's proposals, it would fall far below 100% understanding.

Even so, this process is economical not only because it encourages approval of the IEP, but, more importantly, because it allies parents and home for the programming efforts of the school.

The process of building a relationship with the parents must include dealing with issues that are indirectly related to the child's presenting school problems since they underlay the parents' feelings about their child. The guilt or other feelings decrease the parents' ability to deal directly with communications from others regarding their child's needs and can easily engender anger and alienation that can lead to the confrontation of an appeal. The importance of the proposed contacts is that latently thay can be attuned to to these underlying parental issues. Development of a supportive positive relationship will help the parents learn to cope more effectively with their handicapped child and so facilitate the efforts of all: school staff teaching, the child learning, and parental satisfaction with their child's progress and increasing competence. If one can see the intrinsic value of parent contacts, then the notice and informed consent requirements can be used to initiate, cultivate, and develop this relationship with the home.

SECTION II

Procedural Safeguards

Donald N. Bersoff

BERSOFF, DONALD N. Dr. Bersoff is an Assistant Professor of Law, University of Maryland, Professor of Psychology, The Johns Hopkins University, an attorney for the developmental Disabilities Law Project and Special Consultant to the National Commission for the Protection of Human subjects in Biomedical and Behavioral Research. He received his J.D., at Yale Law School and his Ph.D. at New York University (School Psychology). He teaches a seminar on Rights of The Handicapped and serves as a consultant to many state departments of education, including Connecticut, Maryland, Michigan, Texas, South Carolina, North Carolina, Ohio, Indiana, Iowa, Tennessee as well as to a number of city systems. Dr. Bersoff served as a law clerk with the Children's Defense Fund and the Civil Rights Division, Office of General Counsel, DHEW. For four years at Ohio State University and University of Georgia he trained graduate students preparing for practice as school psychologists. He served as a psychologist in schools, hospitals, and clinics, and was formerly teacher of handicapped children. His many publications refer to the legal and ethical practices of school psychology, neurologically and physically handicapped students, and special education.

SOME INTRODUCTORY CONCEPTS

Due Process Generally

There was a time when the behavior of school officials went virtually unexamined by the legal system. Courts, pleading lack of expert knowledge, were wary of interfering in the discretion of administrators to oversee their schools. Such deference may seem an echo from the far distant past to educators who perceive themselves as overwhelmed by requirements imposed by judges, the federal government, and their own state legislatures. But as late as 1968 the Supreme Court was declaring that:

> Judicial intervention in the operation of the public school system of the Nation raises problems requiring care and restraint. . . . Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values. *Epperson v. Arkansas,* 393 U. S. 97, 104 (1968).

Even more recently, in 1977, the Supreme Court reaffirmed its support for school administrators when it refused to rule that corporal punishment violated the U. S. Constitution or that a hearing was necessary before such discipline could be inflicted. While acknowledging that there were many critics of physical punishment, it also pointed to the fact that almost one-half of the states had provided for corporal punishment by statute. Thus, it concluded:

> We are reviewing here a legislative judgment, rooted in history and reaffirmed in the laws of many States, that corporal punishment serves important educational interests. . . . Assessment of the need for, and the appropriate means of maintaining, school discipline is committed generally to the discretion of school authorities subject to state law. The court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools. *Ingraham v. Wright,* 430 U. S. 651, 681-682 (1977).

But, the Supreme Court has made it clear that the discretion of school administrators and practitioners is not unfettered. The behavior of educators must conform to "fundamental constitutional safeguards" and cannot conflict with "basic constitutional values."

---

[1] The author wishes to thank John Braccio, Michigan State Department of Education; Jeff Grimes of the Iowa State Department of Education; Malinda Hennen of the Baltimore City Public Schools; and Lynn Frank and Marion Nesbit of the Texas Education Agency for their help in the preparation of this paper. The author, of course, assumes responsibility for its ultimate content.

Two basic constitutional values relevant to education appear in the fourteenth amendment to the Constitution. Generally, the amendment protects citizens against the state. More specifically, section one of that amendment forbids the state, among other things, to "deny to any person within its jurisdiction the equal protection of the laws" nor can it "deprive any person of life, liberty, or property, without due process of law." These two quoted phrases comprise the Equal Protection and Due Process Clauses of the fourteenth amendment.

The right to equal protection has been interpreted, in part, as the right to an equal educational opportunity. The state (and school systems for constitutional purposes are considered arms of the state) cannot discriminate among groups of people when it provides education unless there is a substantial and legitimate purpose for so doing. Advocates who fought for the right of previously excluded handicapped children to attend public schools relied heavily on the equal protection clause to win their cases. The courts, while acknowledging that admitting severely disturbing, profoundly retarded, and physically handicapped children would be administratively difficult and financially expensive, concluded that the interests sheltered by the equal protection clause outweighed problems the granting of the right to education for all handicapped children would create for schools. Eventually, the Congress of the United States reinforced these constitutional rights through legislation in section 504 of the Rehabilitation Act of 1973[2] and P. L. 94-142, the Education for All Handicapped Children Act.

The Due Process Clause, the major focus of this paper, is also applicable to school systems. One major component of the clause is *procedural due process*. In this case, the fourteenth amendment requires the state to provide notice (e.g., information to the person concerning what action the state is proposing to take) and an opportunity for the person to be heard (e.g., as in a hearing) in a fair, impartial manner when it seeks to restrict or rescind interests protected by the Constitution. What procedures due process may require under any given set of circumstances begins with a determination of the precise nature of the government function as well as the private entitlement that has been affected by the governmental action. The clause is only applied when the state infringes on an individual's interest in life, liberty, or property.

One acknowledged interest is children's entitlement to a free public education. The Supreme Court has denominated this as a property interest within the fourteenth amendment. Almost all states have created an entitlement to public schooling in their own constitutions or state statutes. "Protected interests in property are normally not created by the [U. S.] Constitution. Rather, they are created and their dimensions are defined by an independent source such as state statutes or rules entitling the citizen to certain benefits." *Goss v. Lopez,* 419 U. S. 565, 572-573 (1975). For example, Ohio provides through state law the right to a free education for all residents between six and 21 years of age. Connecticut's constitution states that, "The public schools shall be open to all children over five years of age." Article VIII of the Maryland Constitution establishes "throughout the State a thorough and efficient system of Free Public Schools . . . ."[3] Once a state has extended the right to education it cannot withdraw that right without first affording the student access to fundamentally fair procedures. As an extension of that right, the school cannot remove children from the regular classroom environment unless it can substantiate the need to do so within the context of an impartial forum in which all parties have the right to be heard.

---

[2] "No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." This broad civil rights act for the handicapped was implemented by regulations effective June 3, 1977, part D of which pertains specifically to preschool, elementary, and secondary schools.

The due process clause also forbids arbitrary deprivations of liberty. The Constitutional meaning of liberty is broad. It does not only mean involuntary incarceration in a prison or commitment to a mental institution. Liberty can also mean the right to privacy, personal security, and reputation. "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, the minimal requirements of the clause must be satisfied." *Goss v. Lopez,* 419 U. S. 565, 574 (1975). This broad principle applied to special education settings means that schools cannot label children as handicapped unless there is some form of impartial hearing to substantiate the stigmatization that may result. While there may be some benefit to children to being labelled as retarded, emotionally disturbed, brain injured, or learning disabled in that they may fall under statutes granting rights to such persons, such labelling by school systems is considered to be an "official branding" by the state because of the many long term potentially negative consequences that may result. For example, a record of impairment may prevent access to some forms of future employment, may increase insurance rates, or be used as evidence of incompetence to make one's own decisions. The Constitution thus prevents the school from unilaterally denominating children as handicapped.

The requirements of due process are not rigid and unitary. Once it is determined that due process applies, the question remains, what process is due? In this regard, the Supreme Court has fashioned this formula:

---

[3] School personnel are also protected by the due process clause. While there is no constitutional right to be a teacher, pupil personnel worker, or administrator, once the state entitles persons to act in those capacities by granting licenses, certificates, or tenure, it cannot withdraw those entitlements without a fair and impartial hearing. Both the license to teach and the tenure that may eventually be granted are property interests protected by the fourteenth amendment.

67

> 'Due process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedure which has traditionally been associated with the judicial process. . . . Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, are all considerations which must be taken into account. *Hannah v. Larche,* 363 U. S. 420, 442 (1969).

Thus, while due process may be required generally when liberty and property interests are at stake, precisely what procedures the state must employ vary. When schools suspend children for less than ten days, for example, the Supreme Court has only mandated that: (1) Students be given oral or written notice of the charges against them; (2) if these charges are denied, they be given an explanation of the evidence authorities are using as a basis for the suspension; (3) students have an opportunity to present their side of the story. However, with regard to corporal punishment, the Supreme Court requires no prior hearing at all and limits due process to the right of students to initiate criminal prosecutions for assault and battery if they incur serious injury due to unreasonable infliction of physical discipline or to seek money damage recovery in civil suits under the same circumstances. At the other extreme, the Constitution requires an exhaustive panoply of rights (e.g., right to appointed counsel, jury trial, appeals, proof beyond a reasonable doubt) when the state seeks to imprison persons under the criminal law.

Whatever is demanded in a specific instance, there are two basic elements to procedural due process: (1) Right to adequate notice; (2) Opportunity to be heard. That is, parents[4] have the right to know what action the school proposes to take with regard to identification, evaluation, and placement in special education programs and to present evidence to contradict the school's proposals and to be heard concerning their own proposals. School systems, however, do not have to decide for themselves the precise contours of due process when they seek to place children in special education programs. The Congress of the United States under P.L. 94-142 (The Education For All Handicapped Children Act) and the Department of Health, Education, and Welfare (DHEW) in its implementing regulations published in the Federal Register on August 23, 1977 have already decided what procedures local and state educational agencies must follow if they seek to qualify for financial support for handicapped children. This paper seeks to explain these procedural safeguards and offer recommendations so that their intent will be fulfilled.

---

[4] In this paper, parents will be used generally to refer to legal guardians and parent surrogates as well as parents. *See* § 121a.10 of the regulations implementing P. L. 94-142 (Federal Register, August 23, 1977). The term will also refer to children when they reach the age of majority.

Statutes and Regulations

As long as it is within the bounds of the federal constitution, Congress can pass statutes (laws) that it believes serve the nation. Finding that the special education needs of eight million American children were not being fully met and that schools not only lacked adequate services to provide appropriate education, but the financial resources to develop and implement the necessary special education and related services for these children, Congress declared it "in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law." Sec. 3, P.L. 94-142. While much of this assistance is financial, P. L. 94-142 makes federal support for special education contingent on the explicit performance of a number of requirements. Pertinent here is § 615 (Procedural Safeguards) which states:

> Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this part shall establish and maintain procedures. . .to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

In inclusive subsections to § 615, Congress enumerated the safeguards it required school systems to develop. However, these requirements were stated only in barest outlines. They did not fully inform educational agencies about what they had to do or the manner in which they had to do it. But, often, Congress will either explicitly or implicitly delegate authority to administrative agencies within the Federal government to write implementing rules so that the broad principles declared in its laws can be more fully delineated and explained. With regard to P.L. 94-142 Congress did exactly that. The Office of Education (OE) within DHEW was granted the right to develop regulations implementing that Act. After public involvement in the process and many drafts, OE published final regulations on August 23, 1977 to take effect on October 1 of the same year. These rules become a permanent part of the Code of Federal Regulations. In this case, the rules are designated as Part 121a of Title 45 (Public Welfare) of the Code. More particularly, the procedural safeguards are found in Subpart E of Part 121a. They encompass §§ 121a.500 to 121a.514, the sections under consideration in this paper.

However, just as Congressional statutes must not violate the Constitution, an administrative agency like DHEW cannot go beyond the authority delegated to it when it writes regulations. It must stay within the intent of the law the agency is seeking to implement. In so doing, the agency must sometimes guess as to the true intent of Congress as Congress does not always draft its laws with clarity. As a result, there may be discrepancies between the language of a federal statute and the administrative regulations. This is true in the case of P.L. 94-142 and its regulations. For example, the law only requires that schools inform parents when they are about to perform a preplacement evaluation of children they believe to need special education services. However, the regulations (see § 121a.504 below) require that schools secure written, affirmative consent before they can conduct such an evaluation. When such discrepancies appear, the regulations may be challenged as unconstitutional as going beyond the agency's power to deviate from Congressional intent. Nevertheless, none of the P.L. 94-142 regulations have been called into question. School officials responsible for implementing the Act should assume that all the regulations are in effect and have the force of law. This paper also makes that assumption.

What now follows is a section-by-section analysis of the implementing regulations insofar as they pertain to procedural safeguards. It is the purpose of this paper to indicate what each of the subsections mean, how they can be implemented with minimum financial and administrative cost, and how schools can not only meet the letter of the law but also its intent to insure that the rights of parents, children, and the school are protected.

DUE PROCESS SAFEGUARDS FOR PARENTS, CHILDREN, AND SCHOOL SYSTEMS

121a.500 – Definition of "Consent", "Evaluation", and "Personally Identifiable"

Sec. 121a.500 states:

> As used in this part: 'Consent' means that: (a) The parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode of communication:
>
> (b) The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) which will be released and to whom: and
>
> (c) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time...
>
> [The definitions of 'evaluation' and 'personally identifiable' have been deleted as they are not pertinent to this paper.]

Consent or, more accurately, informed consent, is central to much of what is to follow. However, informed consent may be more of a principle than a consensually-defined concept as there is considerable dispute as to its meaning. Nevertheless, there is agreement that the doctrine of informed consent comprises three basic characteristics.

1. Knowledge - The person seeking consent must disclose sufficient information in a manner that can be comprehended by the person from whom the consent is sought.

2. Voluntariness - The person giving consent must do so freely.[5] Consent must be obtained in the absence of coercion, duress, misrepresentation, fraud, or undue inducement.

3. Capacity - Persons giving consent must be competent to do so. By law, children are considered incapable of making many legally binding decisions. Some adults may also be considered incompetent, as with persons institutionalized as mentally ill or retarded.[6] At the very least, persons should be able to understand what is being asked of them and respond to a request for consent.

Because of the importance of these three components of informed consent, it may be helpful to discuss them in greater detail.

The Three Components of Consent

Knowledge. Section 121a.500(a) requires that parents be "fully informed of all information relevant to the activity for which consent is sought." Thus, even for maximal implementation, the school need not inform parents of every possible detail with regard to the procedure for which consent is necessary. In fact, it is literally impossible to get fully informed consent. To do so would require the communication of endless technical details and, perhaps, even the content of a doctoral program in special education. Further, it is impossible for school officials to anticipate every possible problem, hazard, benefit, and act that will be involved in the activity for which consent is sought.[7] Thus, the regulations do not require fully informed consent but only the communication of relevant information. The obvious question is, "What is relevant information?" Fortunately, the school need not guess blindly about what information is considered material. Sec. 121a.505 lists those items that DHEW believes school systems must disclose to parents prior to obtaining their consent. A delineation of those items will be found later in the discussion of that subsection. It is important now that school officials understand that full disclosure of every conceivable aspect of the activity is not required, not because that is ethically undesirable, but because it is impossible to do.

This restriction on the duty to disclose does not excuse agencies from making every good faith attempt to inform parents about those items it must disclose. The regulations make clear that a difference in language between the school official and the parent is not to be a barrier to communicating relevant information. Schools do not discharge their duty to disclose by exhaustive dissemination of facts in a language that parents cannot understand, even if that language is English. The regulation requires that communication be in the "native language" of the parent or in another mode of communication, if parents cannot understand spoken language of any sort. As Title VII of the Elementary and Secondary Education Act of 1965, as amended,[8] defines it, "The term 'native language,' when used with reference to an individual of limited English-speaking ability, means the language normally used by such individuals." That definition, however, is admittedly vague because of the inclusion of the term "normally." Rather than guess at what language may be normally used, the following procedure is suggested:

---

[5] This paper will not presume to delve into the philosophical questions of free will and determinism. It should only be pointed out that some people assert that voluntariness is a mirage because for one reason or another all behavior is determined. In any event, it is probably true that absolute autonomy does not exist.

[6] But these people as with others, must first be adjudicated as incompetent by an appropriate tribunal.

[7] See Veatch, Ethical Principles in Medical Experimentation in A. Rivlin & P. M. Timpane (eds.), *Ethical and Legal Issues of Social Experimentation* (1975).

1. The school attempts to find out what language the parent speaks to other adults at home. It can do so by:

a. Asking the child, if that is feasible.
b. Calling the parent at home or at work and engaging in an informal conversation about their child. This is a simple and inexpensive screening device which will expose difficulties in understanding English and in discerning the native language of the parent.
c. Visiting the home, if (a) or (b) is not determinative. This is more time-consuming but will probably lead to more accurate evaluation because the school representative will view parents in the environment in which they presumably feel most comfortable. It will also enhance the possibility that other family members will be present who may ultimately serve as translators or interpreters.[9]

2. The school secures an interpreter if the native language is other than English.

a. Minimally, the interpreter would be a school official knowledgeable in the spoken and written language of the parent.
b. More effective, the interpreter would be a school official the parents already know and trust.
c. Maximally effective, the interpreter would be someone from the parents'

---

[8] *See* P. L. 93-380 § 703,88 Stat. 505 (codified at 20 U.S.C. § 880(b)(1).

[9] Another possible method of discerning language ability is through a formal test such as that used to identify children for bilingual education programs. This is probably not an optimal mode of determination because of the anxiety such a procedure may provoke. Thus, while it may be an objective measure, such a benefit is outweighed by a preference for informality.

family or neighborhood who is both comfortable with school officials and with the parents. As the regulations require full disclosure of all relevant information, such disclosure is enhanced when the interpreter knows the family and possible idiosyncracies in its language.[10]

The selection of an interpreter is intimately related to the requirement in subsection (b) that the person giving consent "understands" the activity for which he or she is giving consent. It is much easier to control and monitor disclosure than it is to control and monitor understanding. It is almost impossible to measure validly another person's comprehension. Because the school can probably never determine if people consent to a procedure because they understood it fully, it may be more accurate to translate "informed consent" as the "duty to disclose." It is feasible for outside observers to determine if school systems have told parents all they must tell under § 121a.505 but it may be impossible to determine if they "understand" what has been conveyed. However, the regulations do require understanding and while that term may be vague on its face it is possible to approach a definition by converting it to behavioral terms. In a sequence from minimal to maximal implementation, the following criteria to assess parental understanding is suggested.[11]

1. The parent signs a written consent form.

2. The parent signs a written consent form on which it states that parents should sign only if they understand the information contained in the form.

3. The parent signs a written consent form only after checking a box prominently placed on the form which indicates that they understand the information contained in the form.

4. The parent signs a written consent form on which they are asked to restate in their own words what they have agreed to.

---

[10] Similar safeguards should be employed if the barrier to understanding is hearing or speaking. The school should use interpreters who know the communications system used by the parents. Similarly, the school should discern if the parents are blind and then use an appropriate form of written or oral communication.

[11] It should be noted that the measurement of understanding is always related to an individual parent. The fact that 50% or 90% of parents understand the information given does not meet the requirement. It is the duty of the school to insure that each parent understands the request for consent. Differential levels of understanding may exist in particular parents but it is not enough to satisfy this provision if 95% of parents understand fully and 5% understand nothing at all.

5. After receiving the signed consent form, a school official talks with the parents and asks them to restate in a nonrote and informal fashion, the activities to which they have agreed.

6. The parent signs a written consent form only after a school official, the parents, and persons of their choosing, attend a meeting during which all the information communicated on the consent form is discussed informally and the parents can relate in a nonrote fashion what the form contains and the activities to which they are agreeing.

Regardless of what level of implementation schools act on, the consent process with regard to understanding should include:

1. Communication in native language.

2. Provision for the parent to retain a copy of the consent form.

3. Notice that the parent is free to call or visit the school for further information before signing. In this regard, the request for consent should contain the name, address, and telephone number of the official responsible for securing consent.

Voluntariness. Communicating all necessary information in a comprehensible manner does not guarantee that the consent obtained is voluntary. Like "understanding," it is almost impossible to determine directly whether a decision is made freely or voluntarily. It can probably only be defined by the absence of unacceptable influences and interferences.[12] If school officials do not use any inappropriate modes of securing consent, then the consent will be deemed voluntary. In another context, DHEW has defined voluntariness as the "free power of choice without undue inducement or any element of force, fraud, deceit, duress, or other form of constraint or coercion."[13] It can be presumed safely that educational agencies do not engage in the more blatant forms of these behaviors. For example, duress is commonly defined as using threats of violence or destruction of property to secure consent. Fraud would entail knowingly misinforming parents so that they agree to some proposal they ordinarily would not if they knew the truth (e.g., the special education coordinator tells parents their child will receive one-to-one instruction six hours a day if they agree to placement in a class for severely retarded children when the coordinator knows that the pupil-teacher ratio is 6:1). However, it is possible for schools to use, perhaps unwittingly, undue influence to secure permission. Undue influence arises in the context of a confidential relationship. Those in power and who seem to be acting in behalf of the welfare of the person from whom they wish to obtain consent misuse the confidence placed in them. Such a relationship is possible when school officials deal with parents. While parents are becoming increasingly wary of school people, it is still true that many parents are frightened and intimidated by professional looking and sounding persons. While there is nothing wrong with communicating the school's point of view, and even attempting to influence a decision, the method of communicating information should not destroy the parents' ability to weigh and consider that information. Some methods for insuring that influence is not undue include:

---

[12] *See* N. Hershey & R. Miller, *Human Experimentation and the Law* 64-65 (1976).

[13] 45 C.F.R. § 46.3(c).

1. The information imparted to parents is correct, even if it means telling them the disadvantages and risks inherent in or potentially present in the school's proposal.

2. The parents are given time to consent.

3. The parents are given the names, addresses and telephone numbers of persons or advocacy groups with whom they can consult for advice and information.

4. Parents are given the opportunity to bring their chosen representatives (e.g., friends, other educators, attorneys) with them to any school conferences concerning the obtaining of consent.

5. The school, at no time, threatens parents with loss of rights otherwise due them if they refuse to consent.

6. Inducement to consent to evaluation or placement in a special education program is not based on inadequate instructional material, teachers, or conditions of the regular classroom.

Finally, subsection (c) indicates that consent, even if freely given, is not permanently binding. An important aspect of voluntariness is knowledge that one can revoke consent. The conditions under which consent is obtained must not only create the atmosphere of voluntariness, but parents must be informed explicitly that they should consent only if they freely choose to do so and that they have the right to retract their permission at any time they wish to do so.

Capacity. The criterion of capacity requires sensitive determinations on the part of school personnel. Persons who a court declares incompetent lose the ability to make decisions for themselves. Adjudication of incompetency may lead to the appointment of a "guardian of the person" who will act as a substitute or proxy decision-maker. School officials who implement P.L. 94-142 should be very wary of distrusting the competency of those from whom they seek consent. The law presumes everyone is competent and there is a heavy burden on those who seek to rebut that presumption. The underlying legal and philosophical premise of the informed consent doctrine is that of thoroughgoing self-determination.

Any adjudication of incompetency lessens personal autonomy and the dignity of the individual. Thus, while capacity is a vital element in securing legally sufficient consent, it is appropriate for educational agencies to presume that parents are competent. Language difficulties or mild intellectual impairments are not bases for schools attempting to seek consent from other than the child's caregivers. On the other hand, consent from parents who clearly cannot comprehend and respond does not meet legal demands. In those cases, it would be appropriate for school systems to initiate procedures for the appointment of a substitute decision-maker who can represent meaningfully the interests of the parents and children.

There is no doubt that implementing the requirements implied in § 121a.500's definitions will result in fewer consents. However, in the long run, school systems will be assured that the consents they do obtain will be legally sufficient and valid. And, by acting honestly and openly, parents will develop stronger feelings of trust toward school officials and their proposals. Other subsections of the regulations contain methods by which schools can contest parents' refusal to consent. Educational agencies should use those methods for overriding parental refusals rather than by inducing consent through misrepresentation, knowing falsity, coercion, inadequate communication of facts, or relating information in a manner that is incomprehensible.

121a.501 – General Responsibility of Public Agencies

This section states:

> Each state educational agency shall insure that each public agency establishes and implements procedural safeguards which meet the requirements of §§ 121a.500-121a.514.

State departments of education are responsible for insuring that local and intermediate (if they exist) school systems implement the mandates of P.L. 94-142 generally and the due process safeguards specifically. There are a variety of means that state departments can use to discharge this obligation. Along a continuum from minimal to maximal efforts in this regard, the following is suggested:

1. The state department requires local or intermediate educational agencies responsible for direct service to submit plans for the implementation of procedural safeguards.

2. The state department develops and issues guidelines for the appropriate implementation of procedural safeguards.

3. The state department provides money for the salary, in part, of local or

intermediate school personnel (e.g. special education coordinators, pupil personnel workers) who are responsible for seeing that procedural safeguards are applied and enforced. (This suggestion has the benefit of enhancing local control but may not provide enough objectivity to insure strict compliance.)

4. The State department publicizes the creation of a toll-free telephone number that parents or school people can use to inform state officials of inadequacies or failures in the implementation of procedural safeguards. (This suggestion can be used in conjunction with the others.)

5. In states which have large populations or are vast in area, the state department opens regional offices populated by one or two staff members who act in a monitoring, consultative, and informational capacity.

6. The state department funds full-time "compliance officers" who, while working at the local level, are directly responsible to the state agency. Such persons would serve not only as monitors but as consultants, answering questions and anticipating problems.

7. The state department periodically audits the implementation of procedural safeguards by education agencies providing direct service. Auditing through site visits by state department personnel who know the requirements of P.L. 94-142 and its implementing regulations is probably the most helpful method of insuring that local agencies are applying the law. To be most useful such visits should be comprehensive. The process should entail reviews of records, visits to classes, and interviews with general and special education teachers, parents, principals and other administrative personnel, and those who work in community agencies representing handicapped people.

Ideally, the state agency would insure that the law is implemented for every child receiving (or denied) special education services in every school system every year. In states where that would be financially or administratively impossible, periodic review is an acceptable alternative. The process would begin by randomly selecting a school system to visit. (Another option here would be to visit school systems on a scheduled basis, once every three years or so.) Then for each selected school system, the state department would randomly choose a sample of teachers whose records and classes would be audited. Or, if the classes or sample of teachers are too large, the state department could randomly select a sample of children within the randomly selected classes or programs. The state agency would then scrutinize the folders of these children, interview their parents and observe and question their teachers and responsible administrative personnel. To insure uniformity, it would be helpful to prepare structured interviews and check sheets prior to any site visits.

These site visits should not only serve a policing function. If done neutrally and objectively, they can act as a remedial device as well. To further this aim, the state department should draft reports which indicate to school systems the extent of their compliance and ways in which they can improve the implementation of procedural safeguards.

In any event, it is the duty of state education agencies to inform the U.S. Commissioner of Education of noncompliance by local agencies. While such notice can trigger inquiries which may result in the loss of federal funds to local school systems for handicapped children, failure by the state agency to monitor systems within its jurisdiction could result in the discontinuance of funds to the entire state.[14]

121a.502 – Opportunity to Examine Records

Sec. 121a.502 states:

> The parents of a handicapped child shall be afforded, in accordance with the procedures in §§ 121a.562-121a.569 an opportunity to inspect and review all education records with respect to:
>
> (a) The identification, evaluation, and educational placement of the child, and
>
> (b) The provision of a free appropriate public education to the child.

This apparently brief provision is actually multi-layered. It incorporates by reference not only several other sections in the regulations implementing P.L. 94-142 but those additional sections refer to regulations implementing another Congressional statute related to education generally, P.L. 93-380. All these provisions should be read together to understand the meaning of § 121a.502.

Sections 121a.562-121a.569 mentioned in the primary section under consideration refer to specific aspects of a broad requirement for confidentiality and protection of information. The major rights afforded parents concern access to records and means for amending them should parents find them inaccurate, misleading, or in violation of their children's privacy. The provisions with regard to P.L. 93-380 refer to § 513 of that Act, sometimes labeled the "Buckley Amendment," but known formally as the Family Educational Rights and Privacy Act (FERPA). Much of the content from the Buckley Amendment has been incorporated into § 121a.502 as well as into the confidentiality provisions of other sections in P.L. 94-142's implementing regulations.

The Meaning of an Education Record

Under § 121a.562, parents have the right "to inspect and review any education records relating to their children which are collected, maintained, or used by the" school system for identification, evaluation, and placement of children in special education programs. To comply with this provision, it is important to clearly understand what is meant by an education record. Education records, as defined by the regulations implementing FERPA,[15] are documents directly related to a student and maintained by an educational agency or institution or by a party acting for the agency or institution. This definition raises three points that require clarification:

---

[14] *See* P. L. 94-142 § 616, implementing regulations § 121a.580-121a.593, and regulations implementing § 504 of the Rehabilitation Act of 1973.

1. Education records are not documents related solely to education. They are any documents that school systems keep. For example, if the local education agency receives reports of a psychiatric or psychological evaluation from a community mental health agency about a particular student and maintains that report in its records, such reports are accessible to parents despite the fact that they may be stamped "Confidential."

2. Accessible records refer not only to those kept in a central cumulative file. Many school personnel create records about children. Not all those records are maintained in a single place. Records are accessible no matter where they are kept by the local education agency.

3. Education records relate not only to documents maintained by the school system but relate also to records maintained by other agencies who have performed services for the school system. For example, students enrolled in school psychology graduate training programs often perform psychological evaluations under supervision for school systems. Usually, the test protocols and reports that are the product of those evaluations are kept in university, rather than school files. Similarly, school systems may contract for the performance of evaluation services with outside individuals or agencies like private practitioners or mental health clinics. Some or all of the evaluation material may be kept in other than school files. In both these cases, or others like them, the fact that other persons or institutions maintain these records do not render them inaccessible to parents.

To comply meaningfully with the access rights of parents to their children's education records it is suggested that schools maintain a list of all documents in a central location.[16] This list would contain the name of the document, the person or agency creating the document, and its present location. In this way, schools can respond to parents' requests for access quickly and methodically.

The maintenance of a central organizing list of documents will help schools comply with further requirements of § 121a.562. Subsection (a) mandates that schools comply with requests for access "without unnecessary delay and before any meeting regarding an individualized education program or hearing relating to the identification, evaluation, or placement of a child." The term "no unnecessary delay" allows for some leeway but in no event can the parents be made to wait more than 45 calendar days after the request for access. It is in the school's interest to permit access as soon as possible as both the development of an IEP and the holding of hearings related to the provision of special education services is contingent on parents' access to records.

---

[15] See C.F.R. § 99.3 or 41 Federal Register 24662-24675 (June 17, 1976).

[16] Such a list will also help schools comply with § 121a.565 which requires that they provide parents on request a list of the types and locations of education records collected, maintained, or used by the school.

Non-mandatory Exceptions to the Access Requirement

There are two kinds of documents[17] that are excluded from the definition of records:

A. The Sole Possession Exception.

The first of these exclusions concerns documents which "are in the sole possession of the maker thereof and. . .not accessible or revealed to any other individual except a substitute." In this regard, school officials should note the following:

1. For these kinds of documents to be inaccessible they must be in the sole possession of the person who created them. Thus, for anecdotal notes of a social worker to remain inaccessible, the social worker must be the one who keeps them. Sole possession is not enough to permit inaccessibility.

2. Oral communication of information from documents, even if those documents are maintained in the sole possession of the person creating them, makes the documents an educational record for purposes of P.L. 94-142 and are consequently accessible to parents. Perhaps the most pertinent example of the meaning of this provision concerns testing protocols and raw data that school psychologists generate when they perform evaluations. Very often, the only tangible disseminated evidence of a psychological assessment is the report that follows testing. However, psychologists almost always attend a case conference of school personnel (e.g., admission, review, and dismissal committees; planning meetings) to discuss possible diagnoses and recommendations for placement and intervention. At these meetings, psychologists will discuss the results of testing and give examples of responses. Despite the fact that they may maintain such items as individual test protocols (e.g., Wechsler or Stanford-Binet Intelligence Scales, Rorschach cards, Bender-Gestalt designs) and the responses to them in their office, if the information from them is communicated orally to others attending the case conference, those protocols become records and thus accessible.

---

[17] Among others mentioned in 45 C.F.R. § 99.3(b), not particularly pertinent here.

It should be noted that Principle 13 of the American Psychological Association Code of Ethics limits dissemination of many psychological tests and other assessment devices to "persons with professional interests who will safeguard their use." While such ethical restrictions should be honored to the extent possible, a profession's ethical code must give way to legal requirements. A clarifying statement issued by Sens. Buckley and Pell, joint sponsors of FERPA, indicated that "[I] f a child has been labeled mentally or otherwise retarded and put aside in a special class or school, parents would be able to review materials in the record which led to this institutional decision. . .to see whether these materials contain inaccurate information or erroneous evaluations about their child."[18] Further, § 121a.562 of the implementing regulations to P.L. 94-142 require that schools permit parents to inspect and review their children's records collected, maintained, and *used* by the education agency in their special education decision-making.

B. The Treatment Record Exception

The other pertinent exception to the requirement of access are records related to a student created or maintained by a physician or mental health professional or paraprofessional and used only in connection with the provision of treatment. Those records may be kept from parents if they have not been disclosed to anyone other than those providing treatment. The right to prevent access under this exception is somewhat broader than under the first. Here treatment records and information from them may be shared with other persons providing the treatment. They need not be maintained solely by their creator. However, parents may eventually come to know what is in their children's treatment records. The regulations implementing FERPA state that treatment records can be personally reviewed by a physician or other appropriate professional of the student's choice. Thus, while parents may not have direct access to treatment documents, they may be able to secure them or information from them from the professional they select to review those documents.

These exceptions to access are not mandatory. The provisions concerning exceptions merely permit school systems to prevent access. However, education agencies may choose to allow access even in those cases where it is not required. Many writers who have considered the issue believe that parents should be presumed capable of seeing any document the school possesses related to their children under the rationale that parents are at least as equally capable as school staff in deciding what is best for their children. The regulations under this section and those that must be read along with them permitting exceptions do not prohibit access; they merely grant school systems the prerogative to deny access to certain carefully delineated documents.

---

[18] 40 Federal Register 1213 (January 6, 1975).

Additional Rights

The right to inspect and review education records under § 121a.562 includes three further components:

A. The right to a response to reasonable requests for explanations and interpretations of the records.

This provision creates two constraints on schools. First, schools cannot make access contingent on the presence of a professional. Parents have the right to review records by themselves with no school personnel present. Second, somewhat paradoxically, schools need to be ready to provide parents professional assistance in understanding the record, but only upon request. Schools may fulfill the assistance function in several ways –

1. Minimally, they may supply parents with requested records and wait for questions.

2. More helpful is written notice to parents at the beginning of each year of their right to both access and interpretation.[19]

3. Most helpful is personal communication with parents prior to the time they come to inspect records informing them that they may have someone from the school explain material contained in the records and that they may ask questions about them. Because most questions concern special education problems generally and test results specifically, it would be preferable to have personnel available who know about these subjects. To be most profitable, if parents agree, the school could offer to have a special education coordinator or school psychologist present to explain and interpret the records, as well as answer questions.

B. The right to request that the school system provide copies of records if failure to do so would effectively prevent parents from inspection and review.

1. At a minimum, schools should provide photocopies of records to parents who are not able to visit the school. In rural areas, parents who live a great distance from the school may be unable to personally inspect records. In poor urban areas, parents either may not be able to afford to travel or may have no means for getting to the school. In cases like these, to deny access because of inability to be personally present in a school office is to violate the law.

2. More in the spirit of access, schools should give all parents copies of records regardless of whether they can visit the school or not. It is very tedious to make longhand notes from what are often voluminous records in the case of children

---

[19] Under FERPA, schools are required to inform parents annually of their rights granted in the Act. 45 C. F. R. § 99.6.

with suspected handicaps.[20]

C. The right to have a representative inspect and review records.

While educational agencies may not require that a school official be present when parents review records, parents can bring anyone they want with them to help read through them. It would be in the spirit of disclosure and openness to inform parents beforehand that such a right is available to them.

Hearings to Challenge School Records
There will be times, despite openness and cooperation by school systems, when parents will challenge the contents of school records. Under §§ 121a.567-121a.570, parents have certain rights in this regard:

1. If parents believe that any information in an education record is anaccurate, misleading, or violates some rights of their children, they may request the school system to amend the information. In some cases, amending may require deletion or destruction. There is no prohibition against destruction of records if done at parental request.[21]

2. Upon a request to amend, the school may take some time to decide whether it is willing to amend the record. The regulation permits a "reasonable time" in which to make this decision but it does not specify what a reasonable time is. It is suggested that school systems delay as little as possible in this regard. While 30 calendar days may be the outer reach of a "reasonable time," it will be better practice to delay a decision no longer than five school days.

3. If the school system decides not to amend the information it must tell parents it refused to do so and inform them they have a right to a hearing to challenge this refusal.

4. Because the interests at stake when parents challenge the accuracy of records

---

[20] Under § 121a.566, schools may charge fees for making copies although they cannot charge fees for searching for and retrieving records or for copies when that would create a barrier to access (i.e., in the case of indigent parents). Here also, however, it is suggested that for maximal implementation, no fees be charged when parents request copies of records in anticipation of challenging school's proposals with regard to identification, placement, or evaluation.

[21] School systems may destroy records at any time prior to parental request for review. *See* 45 C.F.R. § 99.13. It is good practice to periodically review all school records and eliminate anecdotal and unverifiable data and amend data that is no longer totally correct. Such a practice will significantly diminish the number of challenges parents make to school records. Parents can also be asked to review records on a periodic basis to insure accuracy.

is considered to be somewhat less important than when the identification, evaluation, or placement of children in special education programs is challenged, the nature of the hearing challenging the accuracy of school records is less formal and legalistic. The minimal requirements for such a hearing are:[22]

a. A hearing held within a reasonable time (ten days from the time of a request for a hearing would meet this requirement).

b. Notice to the parents of the date, place, and time reasonably in advance of the hearing (five days would be reasonable here).

c. Conduct of the hearing by someone having no direct interest in its outcome. While the regulations do not require that the hearing officer be someone not employed by the school system, schools will obviate the taint of any partiality by using a hearing officer who is not hired by them in an instructional or supervisory capacity. There are stricter requirements with regard to impartiality for those who will hear challenges to the identification, evaluation, or placement of children in special education programs (see discussion in § 121a.507). But because such impartial hearing officers will presumably be available, it will cost school systems little in inconvenience or money to ask those hearing officers (who by law cannot be employees of the challenged school system) to also serve at hearings when records are challenged.

d. An opportunity for parents to fully and fairly present evidence as to the inaccuracy or misleading nature of records. While the regulations do not explicitly require compulsory attendance of witnesses, the opportunity to present witnesses, or to cross-examine school officials, a fair interpretation of the terms "full and fair opportunity to present evidence"[23] would entail those rights. Maximal compliance often means going beyond the bare words of regulations. In the long run, schools will have fewer challenges to all their practices if they afford maximum protection to the rights and concerns of parents and students and involve them in significant decisions which affect their lives.

e. An opportunity to be assisted or represented by anyone, including an attorney, at the hearing. Schools, however, do not have to pay for such representation. The cost can be borne by the parents though schools should inform them of the name and location of free or low cost legal services.

f. A decision in writing within a reasonable time after the hearing is concluded, including a summary of the evidence and the reasons for the decision. Such decisions need not be the length of judicial opinions, which often run several pages. However, bare conclusions or a mere approval or denial of a request to amend or delete does not meet even minimal requirements. A decision should tell parents why the hearing officer decided the way he or she did.[24]

---

[22] *See* 45 C.F.R. § 99.22

[23] 45 C.F.R. § 99.22(c)

g. A decision based solely on the evidence presented at the hearing. Fundamental fairness requires that hearing officers make decisions only on the basis of material presented during a hearing. Hearing officers cannot base outcomes on data given to them privately by one side. Even the minimal requirements of due process demand that the opposing side have the chance to rebut and challenge evidence. This cannot be accomplished if material is presented secretly (see more on this in § 121a.508).

Parents have one further remedy if the school refuses to amend or delete the challenged material even after a hearing. Parents must be told that they may place in the school record a statement commenting on the information in that record and that they may give reasons why they disagree with the school system or the hearing officer. This added information, very much like a minority report, must be maintained by the school system as part of the education record until the school destroys the challenged material. It is most in keeping with the spirit of this provision that the parents' comment be an integral part of the challenged record and not separated from it. For maximum effectiveness, it is preferable that it be attached to that particular part of the record in dispute. Further, should the education record be disclosed by the school system to any other party, the parents' comments and explanations must also be disclosed.

In evaluating whether the requirements of § 121a.502 have been met, school systems may use the following criteria:

1. There is a list in the cumulative file of all records in all locations pertaining to each child.

2. Parents gain access to these records within 5 school days of a request.

3. Rights that are contingent on access are not delayed beyond predetermined time limits. Placement decisions and development of IEPs cannot be accomplished while access to records is at issue. Thus, one method that schools can use to determine whether they truly have an open access policy and practice is to evaluate whether placement decisions and the writing of IEPs occur within routine prescribed time periods.

4. Fewer than 5% of records are challenged because they are inaccurate, misleading or otherwise violative of students' rights.

Finally, failure to comply with the general requirements of FERPA can result in the loss of all money granted to school systems by the Office of Education and failure to comply with the specific requirements of P. L. 94-142 and its regulations may result in the loss of grants under the Act.

---

[24] For a full discussion of the structure and contents of written decisions see material in § 121a.508 below.

121a.503 – Independent Educational Evaluation

This long provision states:

> (a) *General.* (1) The parents of a handicapped child have the right under this part to obtain an independent educational evaluation of the child, subject to paragraphs (b) through (e) of this section.
>
> (2) Each public agency shall provide to parents, on request, information about where an independent educational evaluation may be obtained.
>
> (3) For purposes of this part:
>
> (i) "Independent educational evaluation" means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.
>
> (ii) "Public expense" means that the public agency either pays for the full cost of the evaluation or insures that the evaluation is provided at no cost to the parent . . . .
>
> (b) *Parent right to evaluation at public expense.* A parent has the right to an independent education evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. However, the public agency may initiate a hearing under § 121a.506 . . . to show that its evaluation is appropriate. If the final decision is that the evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.
>
> (c) *Parent initiated evaluations.* If the parent obtains an independent educational evaluation at private expense, the results of the evaluation:
>
> (1) Must be considered by the public agency in any decision made with respect to the provision of a free appropriate public education to the child, and
>
> (2) May be presented as evidence at a hearing . . . regarding that child.
>
> (d) *Requests for evaluations by hearing officers.* If a hearing officer requests an independent educational evaluation as part of a hearing, the cost of the evaluation must be at public expense.
>
> (e) *Agency criteria.* Whenever an independent evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria which the public agency uses when it initiates an evaluation.

P. L. 94-142 itself merely states, in one small part of § 615, that parents have the right "to obtain an independent educational evaluation" for their children. School systems were concerned that unrestricted use of this right would burden them financially. DHEW agreed, and this regulation reflects the judgment of the government that there should be some limitation on parents' rights to secure independent evaluations at public expense.

Sec. 121a.503 grants parents three somewhat overlapping but distinguishable rights: (1) obtain an independent educational evaluation; (2) obtain this evaluation, under certain conditions, at no cost; (3) offer the evaluation as evidence in either an informal case conference or in a hearing to challenge the identification, evaluation, or placement of their children.

The major purpose of this section is to provide parents the opportunity to secure the benefit of an independent assessment. Thus, compliance with this provision is contingent on assuring genuine independence. The regulations require that the one performing such an evaluation not be "employed by the public agency responsible for the education of the child in question." Thus, such evaluators, at a minimum, should not receive salaries from the school system. To insure maximum independence, the person performing the evaluation should also not be a consultant to the system nor receive any fees or benefits from it. However, parents may be the best judge of independence. As long as they are fully informed of their rights under § 121a.503 and its intent, they should be permitted to choose whomsoever they wish to perform the assessment.

A somewhat vague and confusing aspect of this section is the requirement that a "qualified examiner" (§ 121a.503(a)(3)(i)) conduct the evaluation under the criteria equal to that "which the public agency uses when it initiates an evaluation." (§121a.503(e)). There is no clarification as to what constitutes a "qualified examiner." Most assessors employed by local educational agencies are certified school psychologists who are trained to administer individual intelligence tests (i.e., WISC-R and Stanford-Binet), tests of visual-motor ability, educational evaluations, and personality assessment. They are also usually able to perform systematic observations of classroom behavior as well as interview parents, teachers and children. Such people almost always have a masters degree in psychology (e.g., school, clinical, educational) and supervised experience in school settings from three months to one year, although some have a doctorate and a one year supervised internship. Some school systems have begun to employ what are called educational diagnosticians or diagnostic-prescriptive teachers. Such people are most often specially trained teachers who have developed skills in administering educational tests, interviewing, and systematic observation. They are not usually sophisticated in the administration and interpretation of individually given intelligence and personality tests.

While the regulation states that the person performing the independent evaluation must meet the same criteria as the qualifications of the school's examiner, it is probably true that if this requirement were read literally the only eligible independent evaluators would be school psychologists and/or educational diagnosticians employed by other school systems. Such an interpretation may meet the minimal intent of the law but does not insure maximum independence. Also, such an interpretation could conceivably run afoul of some states' laws. Many school psychologists are not private practitioners. Licensure or certification for employment as a school psychologist is different than for psychologists in private practice. In most states, school psychologists are granted eligibility by state departments of education while private practitioners (usually clinical psychologists) are granted eligibility by separate state boards of examiners. Thus, unless school psychologists are also licensed or certificated by the state board of examiners they would not be able to engage lawfully in the private practice of psychology. Educational diagnosticians or prescriptive teachers are rarely, if ever, licensed to practice privately.

The use of clinical psychologists who are in private practice to perform independent evaluations has the positive attribute of insuring maximum independence. However, very often, clinicians know very little about schools and education. Traditional clinicians rely on psychological tests which they administer in their office. Rarely do they ever venture into the classroom itself to view children in their natural environment or observe them in interaction with their teachers — information which may be crucial to understanding the perceived difficulties for which a child has been referred.

It may not have been apparent to the drafters of subsection (e), requiring equivalent criteria for school-performed and independently-performed evaluations, that such a provision severely attenuates the intent of the section itself — to grant access to external, nonpartisan, disinterested evaluators of the parents' choice. The more that educational agencies impose restrictions on the selection of an independent evaluator, the more attenuated the right becomes. A suggestion that perhaps steers the best middle course between the major purpose of § 121a.503 and its subsection (e)[25] is for the school system to recommend either or both of the following to parents:

1. The kinds of information that will aid the impartial hearing officer in reaching the best decision in case the parents contemplate challenging the school's proposals as to placement. Thus, they could suggest that whoever performs the independent evaluation be trained not only in personality, projective, and intelligence testing, but in systematic observation of classroom

---

[25] Subsection (a)(2) requires that school systems, on request, provide information about where an independent evaluation may be obtained. This provision also dilutes the intent of neutrality. It would be better for the school to refer parents to parent or consumer advocacy groups for the names of agencies or evaluators.

behavior, the measurement and assessment of adaptive [illegible],[26] and the administration of formal and informal educational assessment devices (e.g., informal reading inventories).

2. The names and addresses of consumer or parent advocacy groups (e.g., Association for Retarded Citizens, Society for Autistic Children, Epilepsy Foundation, Association for Children with Learning Disabilities, local mental health associations) who will take responsibility for developing lists of evaluators or agencies whom they consider qualified to perform the appropriate evaluation. In this way, the school removes itself from recommending particular persons or clinics and avoids any semblance of partiality or cooperation with independent evaluators.

Most of the rest of § 121a.503 is relatively straightforward and merely indicates under what conditions the independent evaluation is performed at public or private expense. The evaluation will be at public expense when:

1. The parents request it and the school system voluntarily assumes responsibility for payment.

2. The parent disagrees with the school's evaluation, the school system believes that its evaluation is appropriate and initiates a hearing under § 121a.506 (see below), and the impartial hearing officer decides in favor of the parents.

3. The hearing officer, at his or her own discretion (regardless of whether or not parents ask for it), requests one.

The evaluation will be at private expense when:

1. The parents voluntarily assume the cost.

2. The parents request it, the school system believes that its evaluation is appropriate and initiates a hearing under § 121a.506, and the impartial hearing officer decides in favor of the school.

The only other subsection that requires some clarification is (c). If the parents obtain an independent evaluation at their own expense they have the choice as to whether or not they wish to place that evaluation in evidence during a hearing to challenge the identification, evaluation, or placement of their children. They cannot be forced to introduce the evaluation. However, while subsection (c) states that the results of such an evaluation "must be considered by the public agency in any decision made with respect to the provision of a free appropriate public education to the child" this provision should also be read (to insure maximum compliance with the spirit of P. L. 94-142 generally) to allow parents to decide if they want the school to consider those results. However, once they so choose, then schools must, in its placement committee meetings, consider the private evaluation.

---

[26] See discussion of adaptive behavior scales in the monograph on Protection in Evaluation Procedures.

Schools can best evaluate whether they comply with § 121a.503 by noting in how many instances they are forced by hearing examiners to pay for independent evaluations. Such evaluations will only be required when there is a determination that, in some way, the school system's evaluation is inadequate or inappropriate. Schools can avoid the expense of independent evaluations (which may cost from $50 to $300 depending on the extent of the evaluation) by employing highly qualified, well-trained school psychologists and other diagnosticians who can provide wide-ranging, multi-faceted, sophisticated assessment services. If schools are frequently forced to pay for independent evaluations, it will probably not be because of distrustful parents or hostile hearing officers, but because their own personnel are poorly trained in the administration and interpretation of tests and other evaluative devices.

§ 121a.504 – Prior Notice; Parent Consent[27]

This section states:

> (a) *Notice.* Written notice which meets the requirements under § 121a.505 must be given to the parents of a handicapped child a reasonable time before the public agency:
>
> (1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child, or
>
> (2) Refuses to initiate or change [the above].
>
> (b) *Consent.* (1) Parental consent must be obtained before:
>
> (i) Conducting a preplacement evaluation; and
>
> (ii) initial placement of a handicapped child in a program providing special education and related services.
>
> (2) Except for preplacement evaluation and initial placement, consent may not be required as a condition of any benefit to the parent or child.
>
> (c) *Procedures where parent refuses consent.* (1) Where State law requires parental consent before a handicapped child is evaluated or initially provided special education and related services, State procedures govern the public agency in overriding a parent's refusal to consent.

---

[27] *See also* § 121a.500.

> (2)(i) Where there is no State law requiring consent . . . the public agency may use the hearing procedures in §§ 121a.506-121a.508 to determine if the child may be evaluated or initially provided special education and related services without parental consent.
>
> (ii) If the hearing officer upholds the agency, the agency may evaluate or initially provide special education and related services to the child without the parent's consent, subject to the parent's rights under § 121a.510-121a.513 [provisions related to administrative and judicial review/appeal of the local agency's decision].

The intent of this provision like many others, is to increase parent involvement in educational decision-making. It does so by requiring that school systems inform parents (provide "notice") before they take certain actions and that they obtain affirmative permission ("consent") before they engage in other, more intrusive, actions.

At a minimum, the school must notify parents when it wishes to identify a child as handicapped (as in large-scale screening), perform an evaluation of that child, or place that child in a special education program of any type, from resource room to the most restrictive setting. It must also notify parents after they request these services and the school refuses to perform them. Notice in these instances must be given to parents within what the regulations call a "reasonable time." A reasonable time must be defined within the context of the rights at stake. Parents should have enough time to consider the school's proposed actions unhurriedly, yet there should not be so long a time that the child's interest in obtaining an appropriate program is delayed. Ten days notice would seem to be reasonable to protect everyone's interests.

There are greater constraints when school systems propose to conduct a preplacement examination or initially place a child in a special education program and/or provide related services. At those times, the *regulation* requires consent. The *statute* merely requires notice. P. L. 94-142 § 615(b)(1)(C) states that schools must give "written prior notice to the parents . . . when . . . it proposes to initiate . . . the evaluation or educational placement of the child . . . ." Notice and consent are not equivalent. Notice is merely the provision of information to parents that the school intends to examine and place their child. Consent is different in that it requires affirmative permission. Thus, while P. L. 94-142 apparently does not mandate that schools secure approval for testing or placement, the implementing regulations do. Education agencies should consider the necessity for consent as prevailing in the specified instances.

The shift from a notice requirement to that of consent is crucial. Parents must not only know what the school proposes with regard to a preplacement evaluation or initial placement but must affirmatively agree to the school engaging in those functions under conditions which insure that such consent is knowledgeable, voluntary, and competent (see full discussion in § 121a.500). The regulations do not specify the form in which the consent must be granted. At the very least, such consent must be oral. However, oral consent does not provide the school system with a record and proof of permission. It is preferable for schools to use written permission forms, translated if necessary, that parents will sign, indicating whether or not they agree to the evaluation or placement (see both §§ 121a.500 and 121a.505 for more information concerning the format and content of these forms). Maximal implementation will be assured if parents not only receive written explanations and forms with regard to consent, but have the opportunity to talk with appropriate officials about the proposed evaluation or placement.

When Consent is Required

The requirement for consent is only triggered when the school seeks to conduct a preplacement evaluation and when it proposes initial placement of a child in a special education program. Thus, it may be helpful to define what these two procedures entail.

A. Preplacement evaluation.

Schools will implement the intent of the regulations when they secure consent prior to the giving of individually-administered tests or other individually-focused assessment procedures. Thus, large-scale screening of children to identify those who might be handicapped would fall outside this definition, although school systems would need to inform parents of the impending screening. Classroom observation designed to assess teacher-child interaction or for screening purposes would also fall outside the definition. Involvement of children in this kind of assessment is minimal and there are no immediate or direct negative effects on them. When an assessor observes members of a group acting in public, there is, at best, an inconsequential invasion of privacy. However, when a particular child becomes the focus of an assessment whose effect or intent will be to recommend placement in a special education program, then parental consent must be secured for all procedures including testing, interviewing, and observation. While the regulations do not require consent for evaluations once the child is placed, it is recommended that such consent be obtained for any evaluations the school performs, except where the instruments are used to assess academic performance only (*e.g.,* reading, writing, spelling skills). To insure compliance, those responsible for the assessment should not proceed with an evaluation without evidence of either a signed consent form (or some evidence of oral consent) or a court order authorizing the evaluation when parents refuse to consent (this latter possibility is discussed immediately following this present discussion).

B. Initial placement.

The meaning of this term is relatively clear. Consent is only required when the child is first removed from a regular class placement to any kind of special education program or is provided related services. Thus, the provision of speech therapy, occupational therapy, placement in a resource room for even part of the day, as well as placement in a self-contained program and certainly in any other more restrictive environment, requires parental consent. Once children are placed in a special program they may be shifted from one special education program to another without parental consent (but only after notice). However, while such consent is not *required* for minimal implementation, it is recommended, for maximal implementation, that parents consent to all shifts, even within special education. It may be a very important alteration in the provision of services if a child is removed from a self-contained program in a public school setting to residential treatment (or vice versa). Such a shift may, in fact, be more important than removal from a regular class to a self-contained special education program. As with consent for testing, no placement should be made without evidence of parental consent or a court order overriding parental refusal.

A situation not covered by the regulations concerns the question of whether consent must be renewed when a child moves from a special education program in one school system to a special education program in another school system (e.g., from one in County X to one in County Y within a state or from one in State X to one in State Y). It is not clear whether such transfers constitute an "initial placement." However, it would be preferable if consent were reaffirmed in such situations.

As a reminder, even when consent is not required, parents must be notified of all decisions and actions taken by school systems with regard to identification, evaluation, or placement.

Overriding Parents' Refusal to Consent

In earlier drafts of the regulations, parents possessed an absolute veto both as to a proposed evaluation and placement. Without their consent, neither could occur. But, those drafts failed to take into account that there may be adverse interests between a parent and a child in need of special education and related services. For arbitrary or unreasonable grounds, it would have been possible under the proposed rules for parents to deny their children access to psychological services and subsequent remedial intervention by special educators. The final regulations are more appropriate because they now provide for an alternative mechanism permitting schools to challenge the refusal to consent. Depending on the nature of the laws prevailing in each of the states, school systems have two means for overriding a parental veto:

A. Reliance on State Laws

Some states have provisions already in place concerning parental consent. For example, Maryland's State Department of Education By-Laws declare: "Parents . . .have the right of prior informed consent regarding their child's psychological evaluation. . .special education programming and placement in accordance with procedures established by each local education agency."[28] Under this law, parents apparently do possess veto power. However, the school system may have recourse to state parental neglect statutes. A school administrator in states like Maryland, in situations where parents refuse to consent to evaluation or placement, may file a neglect petition. Maryland law defines a neglected child as one "whose parent. . .legally responsible for his care does not adequately supply him with. . .education. . ."[29] In those instances, anyone having knowledge of facts regarding neglect may file a complaint with the juvenile, or other appropriate, court. That action will trigger an inquiry as to possible neglect and can eventuate in a hearing in which the court may appoint a guardian of the child for the limited purpose of consenting to evaluation or placement, if that action is judged appropriate. This procedure, while lengthy, does allow school systems to provide needed services in those cases when parents refuse to consent, even if state laws, bylaws, or regulations otherwise require consent.

B. Reliance on DHEW Regulations

As § 121a.503(c)(2)(i) indicates, where no state law exists requiring consent, a refusal to consent may be overridden by following hearing and appeal procedures delineated in other sections of the regulations.[30] These other sections require that a hearing be conducted before an impartial adjudicator in a setting where both parents and the school may have attorneys or other representatives argue for their position and where each side has the opportunity to present evidence and confront, cross-examine, and compel the attendance of witnesses. After the hearing is completed, the hearing officer then must issue a written decision based on the facts he or she has heard. If either party wishes, they may appeal the decision to a state hearing panel and ultimately to the courts.

Reliance on state laws or P.L. 94-142's regulations places constraints on school systems and creates delay. Resort to a hearing does hinder engaging in even the initial steps which precede placement. It might have been more efficient and economical to develop less rigorous requirements when parents refuse to consent to the preplacement evaluation. But there is little doubt that the intent of the regulations is appropriate. By (1) requiring consent; (2) allowing the school to challenge the refusal to consent; and (3) developing a forum in which both sides will be heard by a neutral adjudicator, the regulations serve the interests at stake of all the parties — parents, whose constitutional rights to direct their children's upbringing is protected; the school, which is carrying out its statutory duty to provide an appropriate education for handicapped children; and most importantly, the children, whose very future may be imperiled or enhanced by the actions of the adults around them.

---

[28] Code of Bylaws, Md. State Bd. of Educ. § 13.04.01.03.

[29] Md. Cts. & Jud. Proc. § 3-801 (1974).

[30] See the discussion below of §§ 121a.506-121a.511 for a full explanation of these procedures.

121a.505 — Content of Notice

This section delineates what information must be related to parents when notice is required in § 121a.504.

(a) The notice under § 121a.504 must include:

> (1) A full explanation of all the procedural safeguards available to parents under Subpart E [Procedural Safeguards];
>
> (2) A description of the action proposed or refused by the agency, an explanation of why the agency proposes or refuses to take the action, and a description of any options the agency considered and the reasons why those options were rejected;
>
> (3) A description of each evaluation procedure, test, record, or report the agency uses as a basis for the proposal or refusal; and
>
> (4) A description of any other factors which are relevant to the agency's proposal or refusal.
>
> (b) The notice must be:
>
> (1) Written in language understandable to the general public, and
>
> (2) Provided in the native language of the parent or other mode of communication, unless it is clearly not feasible to do so.
>
> (c) If the native language or other mode of communication of the parent is not a written language, the State or local educational agency shall take steps to insure:
>
> (1) That the notice is translated orally or by other means to the parent in his or her native language or other mode of communication;
>
> (2) That the parent understands the content of the notice, and
>
> (3) That there is written evidence that the requirements in paragraph (c)(1) and (2) of this section have been met.

Four Major Components of the Notice Requirement

Part (a) of this section lists the four major information elements that the school must supply parents whenever it proposes (or refuses) to initiate or change a child's identification, evaluation, or educational placement. The required information fits within the "knowledge" component of informed consent (see discussion § 121a.500). The four items are:

A. Procedural Safeguards

Parents must be told of all the due process protections afforded in §§ 121a.500-121a.514. The following can be used as a checklist –

1. The opportunity to examine their children's records with respect to the provision of a free appropriate education generally, and their identification, evaluation, or educational placement particularly.

2. The right to an independent educational evaluation.

a. The evaluation will be at public expense if:
(i) The parent disagrees with the school's evaluation and the school agrees to fund an independent evaluation.
(ii) The parent disagrees with the school's evaluation, the school believes its evaluation is appropriate, and an impartial hearing officer decides in favor of the parents.
(iii) A hearing officer conducting a hearing related to any action taken by the school concerning special education requests an independent evaluation.

b. The evaluation will be at parent's expense if:
(i) The parent voluntarily assumes the cost.
(ii) The parent disagrees with the school's evaluation, the school believes its evaluation is appropriate, and an impartial hearing officer decides in favor of the parent.

3. The discretion to introduce an independently obtained evaluation for consideration by the school system in its decision-making process or at a hearing regarding special education programming. In both cases, if the parent chooses to offer the evaluation, it must be considered by school personnel and/or the hearing officer.

4. The right to consent to a preplacement evaluation.

5. The right to consent to the initial placement in special education or related services.

6. The right to be notified of any other action the school proposes to take with regard to the identification, placement or evaluation or provision of education generally of their children.

7. The right to an impartial due process hearing should parents wish to contest the identification, evaluation, placement or provision of a free appropriate public education of their children with the results of such hearing rendered within 45 days of their request. In the context of this hearing the parents will have the right to

a. An impartial hearing officer, neither employed by the school system holding the hearing nor having a personal or professional interest in its outcome.
b. Be accompanied by an attorney at parental expense.
c. Information concerning the availability of free or low-cost legal (or other relevant) services in the geographical area.
d. Be accompanied and advised by persons knowledgeable in special education.
e. Present evidence.
f. Confront, cross-examine, and compel the attendance of witnesses.
g. Obtain a record of the hearing.
h. Obtain written findings of fact and decision from the hearing officer.
i. Have their child present, if they wish.
j. Have the hearing closed to the public.

8. The right to appeal the decision of the hearing officer to the state department of education and have the appeal heard within 30 days of the request.

9. The right to appeal from a decision of the state department of education to either a state court or the federal district court.

10. The right either to keep the child in his or her present program for the duration of all hearings and appeals or to agree to a compromise placement with the school system during this time.

B. Description of Proposed Actions

Parents must be fully informed of the following matters:

1. What action the school system is proposing to take (or what action it is refusing to take).

2. Why the school system is proposing to take the action it is recommending (or why it is refusing to comply with parent's request for action).

3. The options the school system considered as alternatives to its proposed actions.

4. Why the school system rejected those options.

Generally, the disclosure requirements in this portion of the regulation will be triggered when the school plans to evaluate children thought to be handicapped or when it plans to change their educational program.[31] School systems should engage in *mutual* disclosure if they are to act ethically, conform to the requirements of the law, and develop intimate, trusting, and honest relationships with parents. Because schools in the past have not included parents and children in decision-making nor informed them of proposed actions, it is possible that much of the information parents relate and many of the responses children make when given tests are of doubtful veracity. Sidney Jourard, speaking of the validity of information obtained by psychologists, conjectured:

> The millions of psychometric tests mildewing in agency files might be lies told by untrusting clients and patients to untrustworthy functionaries. If psychologists were serving the interests of bureaucracies, wittingly or unwittingly, in their . . . activities, then it would be quite proper for . . . patients not to trust us; functionaries masquerading as professionals are not to be trusted too far.[32]

While the rules with regard to notice may place administrative burdens on school systems, in the long run there will be greater cooperation from parents and fewer costly and time-consuming hearings if schools are open and informative.

What now follows is an attempt to describe two models for complying with this portion of the regulation. The first model concerns informing parents about a proposed educational and/or psychological evaluation; the second concerns informing them of a propsed placement. Both are considered examples of maximal implementation.

Informing Parents of a Proposed Evaluation

The minimal requirements of the regulations can be met if the school tells parents: (1) That it proposes to assess their children with a comprehensive, individual educational evaluation; (2) why it believes that the evaluation is necessary (usually because of some academic or behavioral difficulty); and (3) What devices it proposes to use in the evaluation.[33] However, a fuller method is recommended. This process not only entails meeting with parents prior to an evaluation but also involves a meeting immediately after the evaluation is complete and after a written report has been drafted.[34] The approach, thus, has three steps:

---

[31] As noted in § 121a.504, in addition to notice, consent is required for a preplacement evaluation and initial placement.

[32] S. M. Jourard, Some reflections on a quiet revolution. In S. L. Brodsky (Chm.), Shared results and open files with the client: Professional responsibility or effective involvement. Symposium presented as the annual meeting of the American Psychological Association, Washington, D. C., September, 1971.

[33] How the school can fulfill the purposes of (3) is found in (C) below.

[34] This method is adapted from the work of Bersoff, D. N., The Ethical practice of school psychology: A rebuttal and suggested model, *Professional Psychology,* 1973, *4* 305-312 and Fischer, C. T. The testee as co-evaluator. *Journal of Counseling Psychology,* 1970, *17,* 70-76.

1. Coadvisement: This is an expansion of the principle of informed consent. The evaluator (usually a psychologist or educational diagnostician) tells the child and his or her parents how he or she functions; informs them of the person who referred the child and the reasons for the referral; describes the nature of the assessment devices to be used as well as their merits and limitations; what kinds of information will eventually be put into a report; and who might eventually read the report. The evaluator then asks the child to tell how he or she perceives the purposes of the assessment (thus increasing the accuracy of subsequent interpretation of test behavior) and what he or she feels the consequences of such an assessment might be. The evaluator then secures written consent from the parents (and child, if possible) to proceed with the assessment.

2. Sharing Impressions: Immediately after each evaluation session, the evaluator, the child, and the parents engage in a discussion in which the evaluator gives his or her interpretations of the child's test, interview or classroom behavior as the evaluator has just experienced it. By conferring with the child, the evaluator attempts to extrapolate from the assessment situation to real-life situations. This kind of discussion provides immediate information to the child about how others perceive his or her behavior and enables the evaluator to check out hypotheses about how equivalent the observed test behavior, for example, is to actual classroom behavior. It also gives the child a chance to disagree with the evaluator's initial interpretations and to offer perceptions of his or her own behavior. For example, a psychologist may note that on the block design subtest[35] of the WISC-R, the child very neatly arranges the blocks for the first three test items but becomes increasingly sloppy and careless. After the WISC-R has been completed, the psychologist then might say: "I noticed that you did the blocks very carefully at first but then didn't do them as neatly after a while. Is that how things go in school? Do you start your work with a lot of good intentions to begin with but soon give up and become careless? The child could agree with this interpretation, thus yeilding a lot of important information about the causes of the child's academic difficulties and possible modes of educational intervention. Or, the child could disagree and say that he or she worked fast at the end because he or she was tired, wanted to go out to play because the test was given during the normal recess period, or had to go to the bathroom (and so on). Thus, rather than assuming that behavior observed in the testing situation, interview, or one classroom session can be extrapolated to all other situations, the evaluator has an opportunity to discover the situations or contexts in which the behavior does occur. This method prevents the child from being mislabeled and interpretations of his or her behavior from being overgeneralized. The outcome should lead to fewer challenges to the school's evaluation, diagnosis, and proposed class placement.

3. Critique of the Written Evaluation: After the assessment is complete and the evaluator has prepared the report, he or she shows the parents (and the child, if

---

[35] A timed subtest where the child is asked to put multi-colored wooden or plastic blocks together to match a design on a printed card.

possible) a copy of the written evaluation. This insures that the report will be recorded so that it is understandable to all concerned, further complying with the spirit of these regulations. In addition, knowing that the parent is going to read the report, the evaluator will strive all the more to be true to the child, to capture his or her world as well as words allow, and to avoid overstatements, unintended implications, and loose descriptions. Then, the child and the parents are given the opportunity to clarify the points made, to add further material, and, if there is a disagreement between the evaluator and the parents (or child), an opportunity to provide a dissenting view, in writing if warranted. Finally, the evaluator receives permission to disseminate the report to relevant school personnel.

This process lays the groundwork for much of what will follow in the school's attempt to provide an appropriate educational placement for the child. Because the parents have been fully informed about the evaluation and, indeed, have participated in its development and fruition, the foundation has been laid for cooperative non-adversarial attempts to formulate individual education plans and select the maximally effective special program.

Informing Parents of a Proposed Placement

The previous procedure was accomplished primarily through personal communication. But, schools can give effective and informative notice through a written medium. The following letter may serve as an example of what and how a school system might tell parents when they wish to place a child outside of the regular education environment.

> Dear Mr. and Mrs. Gleawards:
>
> We are planning to transfer your daughter, Deana, from her present placement in a class of 32 children housed in an open setting she shares with three other classes of about 30 children each. We would like to place her in a smaller class of 10 children that is not in an open setting. This kind of a room is called a self-contained class. There, she would spend most of the day with one teacher. We believe that this would be the most helpful placement for her in the light of some academic and behavioral difficulties we have discovered as the result of an evaluation we conducted. You may recall that two months ago you consented to a full-scale psychological and educational evaluation after Deana's teacher reported that she was having significant problems in reading, had difficulty listening to directions, and did not spend more than ten minutes at a time in her seat doing independent work [The writer would place here a description of the evaluation procedures used, a method for which is discussed below in Part (C)].
>
> Our evaluation shows, although Deana is ten years old and is presently in the 5th grade, that she can only read words an average second grader can. Part of this problem, we have discovered, is because she has some hearing problems according to our audiologist, a person specially trained to assess hearing ability. In our observations of her in the classroom, we found that she got out

> of her seat, rather than do assigned work, about 5 times an hour, that she interrupted the teacher while she was talking about once every three minutes, and that during a five day period, she was only able to complete one independent seatwork assignment of 10 she was given.
>
> The kind of class that we would like to put Deana in is called a learning disability class. This class is for children of at least average intelligence (which Deana is) who are more than two years behind in reading or other academic skills like arithmetic, spelling, or writing. We thought of perhaps keeping her in her present open space classroom for most of the day and having her tutored one hour a day by our reading resource teacher. Such a program would have the advantage of keeping her with her classmates and friends. However, we are proposing the full day self-contained classroom because of the seriousness of her reading difficulties, the fact that her hearing can be monitored more closely so that we can determine in the near future whether a hearing aid will be appropriate for her, and so that we can attempt to modify her behavior with the goal of increasing her attentiveness, her ability to listen to the teacher with fewer interruptions, and her capacity to complete her seatwork. However, because we feel it important to keep Deana in contact with her present friends, her program will be scheduled so that she can take gym and art with her present classmates and go to the cafeteria for lunch at the same time they do.
>
> If you have some questions about what we are proposing, please feel free to visit with or call Tom Buffington, our coordinator of special education. He can be reached by telephone at 555-1213.
>
> Please know that we will not change your daughter's placement unless you consent to the change. Under both federal regulations and our ownstate and local rules, you have a right to an impartial hearing to challenge our proposals. The right to such a hearing encompasses the following: [At this point, the letter (or personal conversation) would detail all the rights delineated in Part (A) above].

It would probably be most helpful if both the information provided about evaluation and placement were done in person. Certainly, the sharing impressions and critique of the written evaluation portion of the assessment procedure almost require this. The point has been made many times before in this paper, but it bears repeating — short term investment of time will obviate the need for lengthier, more complex, and adversary-like interactions in the future. If parents cannot come to the school, the school should consider sending out appropriate personnel to the parent's home. But, at the very least, the school must write to the parents and tell them of the material outlined in this section. Methods for evaluating whether parents have understood the information communicated to them are described in §121a.500.

C. Description of Evaluation Procedures.

In telling parents what actions they propose (or refuse) to take with regard to special education programming, the school system must describe the evaluation devices they used in reaching their decision. In like manner, when the school is planning to evaluate a child they must describe the evaluation devices they propose to administer. Two points are important in this regard. First, to describe evaluation procedures is not merely to list them. Second, any information regarding assessment devices must be communicated without resort to technical jargon. Section 121a.505(b)(1) requires that any notice to parents must be "written in language understandable to the general public." To conform to this requirement and to insure that any consent to preplacement evaluations and initial placement is genuinely knowledgeable, school systems should list and describe the instruments they propose to use or have used. Some examples of how this may be done follow in the context of a letter to parents.

Minimal Implementation

In recommending that Deana be placed in a self-contained classroom for learning disabled children, we relied on the following tests:

a. WISC-R; an individually administered test of general intelligence.

b. WRAT (Reading only); an individually administered reading test that measures word recognition skills.

c. Classroom Observation; we observed Deana in her regular classroom.

Moderate Implementation

a. WISC-R; the Weschler Intelligence Scale for Children (Revised Edition), given to a child in a one-to-one situation. The test is designed to measure a child's general intelligence by seeing how she does on a number of different kinds of smaller tests within the larger one.

b. WRAT (Reading only); the Wide Range Achievement Test, an individually administered reading test that measures a child's ability to recognize many unrelated words.

c. Classroom Observation; a school psychologist (Dr. Skinner) observed Deana in her regular classroom for twenty minutes each time on three separate occasions during the week of March 20, 1978.

Maximal Implementation

a. WISC-R; the Wechsler Intelligence Scale for Children (Revised in 1972). This test was given by Dr. Skinner, the school psychologist. It was administered in a one-to-one situation with only Dr. Skinner and Deana present in his office. The test is designed to measure a child's general intelligence. The WISC-R has 11 smaller tests within it. One subtest tries to see how much the child knows about the world around him (such as the number of days in a week, the reason we celebrate the Fourth of July, etc.) Another test asks the child to rearrange cartoon pictures in what the test writer believes is the correct order. Another asks the child to remember a string of separate numbers.

b. WRAT (Reading only); the Widd Range Achievement Test. We gave Deana only the reading part (it also contains an arithmetic and spelling section). This test measures how well a child can recognize words printed on a page. The words don't appear in a story but are printed in a string of unrelated words. The test does not measure how well children can understand a story, only how well they can read separate words.

c. Classroom Observation: Dr. Skinner, our school psychologist, visited Deana in her regular classroom during her reading sessions. He did this three times on March 20, 23, and 25th, 1978 for twenty minutes each time. He observed the class to see how well she was reading orally from books, how well she listened to the teacher, and how much she may have been bothering other children while they worked. He was also looking to see how effective the teacher was in teaching Deana and controlling the class.

D. Other Factors

Subsection (a)(4) is a catchall section in which the school should describe any other reasons, procedures, or information the school used in recommending its proposed actions.

This lengthy exposition has only interpreted and illustrated subsection (a) of §121a.505. However, the two remaining subsections can be dealt with much more quickly. Subsection (b) requires that the school write comprehensible notices to their parents in their native language or by some other appropriate mode of communication. Full discussion of how schools might do this is found in § 121a.500 of this paper.

Subsection (c) concerns the notice rights of parents whose native language is not written. Such parents may come from certain American Indian tribes or are parents who are auditorially handicapped and use some form of sign language. In those instances, the notice must be translated orally or by sign so that the parent understands the content of the notice. Means for employing an interpreter are discussed in §121a.500.

Finally, the regulations require school systems to maintain written evidence that the notice to parents who cannot comprehend written language know and understand what the notice says. The point was made in §121a.500 that it is easier to insure that the notice has been communicated than it is to monitor understanding. In responding to the mandate in §121a.505(c)(3) for written evidence of communication and understanding it is, of course, impossible to secure direct indication in writing from the parents. In these cases interpreters should assess whether or not they believe the parents have understood what they have tried to relate. Guidelines for evaluating understanding appear in §121a.500. However, to further enhance the chance that genuine comprehension has occurred, it is recommended that the parents know and trust the interpreters. The most helpful interpreters (if they can be found) will be members of advocacy groups or family members who know both written English and the native oral language.

121a.506 – Impartial Due Process Hearing

This section asserts:

> (a) A parent or a public educational agency may initiate a hearing on any of the matters described in § 121a.504(a)(1) and (2).
>
> (b) The hearing must be conducted by the State educational agency or the public agency directly responsible for the education of the child, as determined under State statute, State regulation, or a written policy of the State educational agency.
>
> (c) The public agency shall inform the parent of any free or low-cost legal and other relevant services available in the area if:
>
> (1) The parent requests the information; or
>
> (2) The parent or the agency initiates a hearing under this section.

The requirement of an impartial hearing is the central feature of the Procedural Safeguards regulations. This section introduces the concept of the hearing in skeleton form. Subsequent sections flesh out its precise contours. It is during the hearing that both sides have the opportunity to present evidence and offer witnesses to an impartial adjudicator who will subsequently render an objective and fair decision. Either the parents *or* the school system may request a hearing on any matters pertaining to the proposal (or refusal) to initiate or change the identification, evaluation, or placement of the child or the provision of a free apropriate public education.

It is left up to the States to decide what body will conduct the initial hearing. Some states do not provide for hearings at the local education agency level but place responsibility for them with the state department of education. Other states mandate that the local school system conduct the hearing. Still others, mainly larger states, provide for hearings at the intermediate agency level (administrative units incorporating several local school systems). While any of these arrangements will satisfy the regulations, it is probably better if the initial hearing is held at the local level. It will not only be more convenient to do so, but it will seem less formidable to parents and perhaps improve chances for negotiation, thus precluding the need for a hearing. In large states, travel to the seat of state government may mean unnecessary expense for both schools and parents.[36] It will also be easier to arrange a hearing at a local level. A final decision must be rendered by the hearing officer no later than 45 days after parents request a hearing,[37] and thus a more easily arranged setting will help to insure that this requirement is met.

Finally, § 121a.506 requires that the educational agency responsible for holding the hearing inform parents of the availability of free or low-cost legal services or other relevant services. This requirement is fulfilled in the notice described in § 121a.505. In adequately rendering this service the agency should develop a list of attorneys in the local area who know about the rights of handicapped people, education, and children. There are some centers in the United States from which this information might be obtained – The Children's Defense Fund in Washington, D.C., the Harvard Center for Law and Education in Cambridge, Massachusetts, the Developmental Disabilities Law Project in Baltimore, Maryland, the National Center for Law and the Handicapped in South Bend, Indiana, the Childhood and Government Project in Berkeley, California, or the Mental Health Law Project in Washington, D.C. At the local level, inquiries should be made at legal services clinics and consumer advocacy groups such as associations for retarded citizens. Another good source is each state's Protection and Advocacy (P&A) system, presumably in existence in every state at this time. P&A systems were mandated under § 113 of the Developmentally Disabled Assistance and Bill of Rights Act of 1975 (Pub.L. 94-103) and are designed to protect and advocate for the rights of persons with developmental disabilities (mental retardation, autism, cerebral palsy, epilepsy). Because they have the authority to pursue legal and administrative remedies, they should be able to give local agencies the names of competent attorneys. In addition to attorneys, schools should also develop lists of qualified psychologists, educational diagnosticians, physicians, and others who can provide diagnostic services for those parents who wish to obtain an independent evaluation of their children. All this information must be given to parents any time they request it or when they or the school request or initiate a hearing with regard to special education.

121a.507 Impartial Hearing Officer

§ 121a.507 states:

> (a) A hearing may not be conducted:

---

[36] This expense could be obviated, however, by the state department holding hearings at the site of the local school system.

[37] See § 121a.512 discussed below.

> (1) By a person who is an employee of a public agency which is involved in the education or care of the child, or
>
> (2) By any person having a personal or professional interest which would conflict with his or her objectivity in the hearing.
>
> (b) A person who otherwise qualifies to conduct a hearing under paragraph (a) of this section is not an employee of the agency solely because he or she is paid by the agency to serve as a hearing officer.
>
> (c) Each public agency shall keep a list of the persons who serve as hearing officers. The list must include a statement of the qualifications of each of those persons.

Insuring Impartiality

If the hearing is the central feature of due process, the hearing officer is the crucial element in insuring that the intent of the procedural safeguards is satisfied. The fundamental credential of the hearing officer is impartiality. The term implies objectivity, fairness, and neutrality. The regulations attempt to guarantee impartiality by declaring ineligible persons who are employed by the agency responsible for or involved in the education or care of the child. This is a rather easily understood and implementable restriction. Simply, if the child is enrolled in a public school, no one hired on a full-time or part-time basis by the system in which the school is located may serve as a hearing officer in a hearing related to that child.[38] This restriction would include administrators (including the school superintendent), teachers, and consultants. Members of the school board of the agency holding the hearing should also be disqualified. Likewise, if the child is in an institution, no one similarly employed by the facility should serve as a hearing officer.

Somewhat more vaguely, the regulations secondarily attempt to guarantee impartiality by proscribing the use of hearing officers who have a personal or professional interest which would interfere with objectivity. This additional provision is apparently included to sensitize school systems to the possibility that factors others than mere status as an employee may interfere with objectivity. For example, professors of special education at a local university are not employees of a school system. Yet, they may place student teachers for practical experience in that system and would, therefore, be more or less dependent on it for fulfilling the requirements of their own teacher education program. It is possible that the professor, though apparently neutral, might feel inclined to favor the decisions of the school, especially in instances where many colleges or universities are competing for student-teacher slots.

To satisfy the requirement for impartiality the following is suggested:

1. The parents are given the opportunity to meet with the person named as

---

[38] Although as the regulation points out, mere employment as a hearing officer does not violate this rule. § 121a.507(2)(b).

hearing officer a few days before the hearing. The purpose would not be to discuss the particular case, but to become acquainted with the person who will hear it.

2. The parents are given the resume and credentials of the hearing officer, including all past, present, and contemplated associations with the agency holding the hearing.

3. The parents agree in writing to the appointed hearing officer.

The best method for evaluating whether school systems have truly appointed neutral hearing officers is to monitor the number and percent of appeals to the state education department or to the courts grounded (in part or solely) in the assertion that the hearing officer was biased or partial.

As a rule of thumb, the greater the distance between the administrative agency and the selection, training, and assignment of hearing officers, the greater the likelihood of preserving neutrality.[39] Thus, these three functions – selection, training, and assignment – are best done by other than the agency holding the hearing. For example, if the local school system is responsible for the hearing, the hearing officer should be assigned by the state or some independent agency. The same would be true for selection and training. There are many advocacy groups available who know both special education and the law who are independent of any educational system (some were named in §121a.506). The state could contract with these groups to train and develop criteria for the selection of hearing officers.

Training and Selecting Hearing Officers

The training of these future hearing officers is very important. Training sessions should be extensive and involved. Some crucial features of such training are:

1. Didactic education concerning the tenets of the Constitution and the common law that are used in analyzing controversies among parents, their children and the state.[40]

2. Didactic education concerning the definition and implementation of due process generally.

3. Extended summary of all the laws impinging on the rights of handicapped children, their parents, and the school. At a minimum, a hearing officer should

---

[39] *See* A. Abeson, N. Bolick, & J. Hass, *A Primer on Due Process* 31-36 (1976).

[40] For constitutional purposes, "state" is broadly defined and includes local and intermediate school systems.

know the major provisions of:

a. P.L. 94-142
b. Regulations implementing P.L. 94-142
c. Rehabilitation Act of 1973 § 504
d. Regulations implementing § 504
e. Family Education Rights and Privacy Act ("Buckley Amendment")
f. Regulations implementing FERPA
g. State constitutional provisions regulating education
h. State statutes regulating education generally and special education particularly
i. State regulations or bylaws implementing state statutes
j. Local regulations, guidelines, and policies regarding special education.

4. Role playing the conduct of a hearing. Trainers could use prepared scripts or general outlines of defined roles. But, the important aspect of this activity is that trainees have the opportunity to rehearse and modify the many behaviors they will have to engage in during the course of the hearing, such as accepting documents, ruling on evidentiary matters, and making decisions in the midst of a dispute between participants.

5. Practice in the writing of final decisions which include both findings of fact and conclusions of law.[41]

Another factor in improving the chances for impartiality is the selection of competent persons expert in special education and related services. The more expert and well-known the person is in his or her own right, the less he or she will need to rely on the approval of local or state education agencies. Persons selected for training should know about educational assessment, handicapping conditions, and the potential range of services appropriate for handicapped children. The Council for Exceptional Children[42] has outlined seven criteria which they think useful in selecting hearing officers:

1. Not be involved in the decisions already made about a child regarding identification, evaluation, placement, or review.

---

[41] Like other states, Michigan has prepared extensive material useful for the purposes of fulfilling No. 1-5. The state department of education has two reports, "The Law: Assessment and Placement of Special Education Students" (1977) and "A Model for a Special Education Due Process Hearing." (1976) Both may be obtained by writing John Braccio, Ph.D., State Dept. of Educ., P.O. Box 30008, Lansing, Michigan 48909 or calling him at (507)373-0923.

A model for writing decisions is found in § 121a.508.

[42] A. Abeson, N. Bolick, & J. Hass, *A Primer on Due Process* 32-33 (1976).

2. Possess special knowledge, acquired through training and/or experience, about the nature and needs of exceptional children, including the types and qualities of programs available at any time to handicapped children.

3. Be sufficiently open minded so that they will not be predisposed toward any decisions that they must make or review but at the same time be capable of making decisions.

4. Possess the ability to objectively, sensitively, and directly solicit and evaluate both oral and written information that needs to be considered in relation to decision making.

5. Have sufficient strength to effectively structure and operate hearings in conformity with standard requirements and limits and to encourage the participation of the principal parties and their representatives.

6. Be sufficiently free of other obligations to provide sufficient priority to their hearing officer responsibilities and to meet required time lines for conducting hearings and reporting written decisions.

7. Be aware that the role of the hearing officer is unique and relatively new, requiring constant evaluation of the processes, their own behavior, and the behavior of all the principals involved for purposes of continuously trying to improve the effectiveness of the hearing process.

There is probably no more costly aspect to the Procedural Safeguards section than the employment of hearing officers. Because they should be experts in their field, fees for each day's service will be $100 at a minimum. Because of the cost, some school systems have attempted to curtail expenses for hearing officers by trading personnel. For example, a special education coordinator from School District D serves as a hearing officer in School District P; later, the special education coordinator (or other appropriate personnel) from School District B serves as a hearing officer in School District D. Because this shift is done on school time there are usually no costs involved for either school district and because neither hearing officer is an employee of the school district in which he or she is presiding over a case, the arrangement satisfies the major mandate of § 121a.507. While an agreement such as this does meet the literal requirements of this section, it may have too much taint of inherent bias to maximally comply with its spirit. The practice is particularly dangerous in small states where the charge of an "I'll scratch your back — you scratch my back" bargain reasonably could be made. In large populous states, where trade-offs would be made only to distant school systems, the practice may be more appropriate.[43]

---

[43] The discussion here has implied the use of a single officer at the local hearing level. However, there is nothing to preclude local school systems from employing a tribunal rather than a lone adjudicator. Obviously, that would be very costly and is certainly not necessary under the rules. It is suggested that at least three persons hear appeals at the state level (see § 121a.510).

In complying with the intent of § 121a.507 there are at least two dimensions one should consider to insure impartiality: *Who employs* and *Who is employed.* The concept of distance from the agency holding the hearing should guide choices in both areas. Using these criteria the following may be helpful:

	Who Employs	*Who is Employed*
Minimal Implementation	1. The agency holding the hearing.	1. Special education and pupil personnel workers from other school districts.
to	2. Another state administrative agency (i.e., for local hearings, the state dept. of education would employ the hearing officer).	2. Special education and appropriate mental health professionals (e.g., school or educational psychologists) employed as professors in universities.
Maximal Implementation	3. An independent body (e.g., the state planning and advocacy unit for the handicapped) who pays the hearing officer from federal funds.	3. A small group of full-time persons trained by an independent entity and funded by federal money (serving either predetermined terms of 1 - 3 years or for indefinite terms).

121a.508 – Hearing Rights

(a) Any party to a hearing has the right to:
(1) Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children;
(2) Present evidence and confront, cross-examine, and compel the attendance of witnesses.
(3) Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five days before the hearing;
(4) Obtain a written or electronic verbatim record of the hearing;
(5) Obtain written findings of fact and decisions. (The public agency shall transmit those findings and decisions, after deleting any personally identifiable information, to the State advisory panel established under Subpart F).[44]
(b) Parents involved in hearings must be given the right to:
(1) Have the child who is the subject of the hearing present; and
(2) Open the hearing to the public.

Minimal Safeguards

As noted, the hearing is the central and dominant mechanism for insuring that special education decisions are made on behalf of the handicapped child. This section delineates the minimal guarantees that both parents and the responsible educational agency possess prior to and during the course of the hearing. Subpart (a) of the regulation lists those guarantees. They include the right to:

---

[44] The establishment, membership, functions and procedures of the State advisory panel is found in §§ 121a.650-121a.653.

A. Be Accompanied by One's Chosen Representatives.

Parents and school systems have the right to retain counsel. Parents do not have the right to appointed counsel. That is, school systems are not required to pay for the parents' attorney. But, at a minimum, they must inform the parent of any free or low-cost legal services available in the area (see § 121a.506). There is no prohibition against school systems offering indigent parents access to independent attorneys whose fees would be assumed by the system, however.

In addition to attorneys, parents may also bring with them independent experts in special education and related services. School systems should grant wide latitude in this regard. It is better that the hearing officer disqualify a person brought by parents under this subsection than for the school system to contest the attendance of parents' experts prior to the hearing.

B. Present Evidence.

There are two kinds of evidence that parties potentially may introduce: oral testimony and documents. Both are appropriate. Witnesses may either relate what they have observed or what they have said. They may also bring with them written material such as social histories, psychological reports, or individual education plans. Or, documents themselves may be introduced with no accompanying oral testimony. For ease of reference and orderliness, each document should be marked (*e.g.*, Parents' Exhibit A, School's Exhibit D).

The rules concerning the introduction of evidence in these hearings are usually relaxed compared to judicial proceedings. Hearing officers can properly allow what judges would exclude as hearsay[45] or tangential evidence. Obviously, irrelevant evidence of any kind should not be admitted. To increase the importance and solemnity of the hearing, and to enhance its truth-finding function, all witnesses should testify under oath.

C. Confront, Cross-Examine, and Compel the Attendance of Witnesses.

Inherent in the concept of due process is the right to know what evidence is being presented that may be adverse to your position and to know who has presented that evidence. These elements comprise the safeguard of *confrontation.* Any evidence that the hearing officer or panel is asked to consider or any witnesses offering that evidence must be known to both sides. No evidence can be offered *"ex parte"* (*i.e.*, by one side without knowledge by the other or out of hearing by the other). All evidence must be formally offered in the context of the hearing. Hearing officers cannot consider evidence not offered at the hearing. At the appeals level (*i.e.*, state hearing) the only evidence the review panel can consider is that present in the official transcript of the local hearing or offered as additional evidence during the appeal. The review panel may not consider any *ex parte* documents or oral information.

---

[45] Hearsay is usually defined as an out-of-court assertion offered in court for its truth. There are so many exceptions to the hearsay rule that even judges sometimes have difficulty in ruling on the admission of evidence claimed to be hearsay.

After witnesses have presented evidence the representative for the opposing position has the opportunity to question that witness. This is called the *cross-examination.* Typically, cross-examination is designed to test the perception, memory, and sincerity of the witness. The opposing attorney uses cross-examination to cast doubt on the witness's ability to observe, to remember accurately, and to tell the truth. He or she can raise doubts about the latter by introducing prior statements that are inconsistent with the ones presented at the hearing or by showing bias. Usually, the scope of the cross-examination is restricted to matters presented during the direct examination. After cross-examination, the representative who originally called the witness may engage in what is called a re-direct examination. This permits the presenting side to "rehabilitate" the witness whose original testimony may have been damaged on cross-examination. The scope of the redirect examination should be limited to matters raised during the cross-examination. If reasonable, any witnesses may be recalled at a later time.

Parents (or schools) would engage in a hollow exercise if they could not have crucial witnesses present at the hearing. For example, parents may wish to call a school official who in the past has sided with them. The school cannot prohibit that official from attending the hearing and testifying for the parents. The right to *compel the attendance of witnesses* guarantees the parents' prerogative in this regard. Unless the hearing officer decides that a request for the attendance of a witness is frivolous because his or her testimony will not add any further information or will merely repeat what has already been said, all requested witnesses must attend the hearing. It is recommended, if such rules do not already exist, that the legislature or the state department of education write regulations authorizing the appropriate educational agencies to subpoena witnesses in those rare instances when potential witnesses refuse to attend. This is the only sure way to guarantee maximal implementation of this provision.

D. Prior Knowledge of the Other Side's Evidence.

Hearings are not supposed to be surprise parties. They are designed to ascertain the truth and to settle disputed issues as reliably, objectively and as fairly as possible. They are not games where decisions are won through trickery. One way to prevent the unexpected and assure reliability is through the prior discovery of evidence. Discovery is a legalism for the sharing of documents and witness lists in advance of the hearing. But, besides reducing the chances for encountering the unexpected, discovery has other salutary functions:[46]

1. It narrows the issues to be heard by revealing lack of serious contest on some and by pointing up those likely to be crucial.

2. It facilitates the presentation of evidence at the hearing by increasing the likelihood that all relevant evidence will be known and analyzed before the hearing.

3. It increases the likelihood that the case will be decided on its actual merits.

4. It increases the chances for prehearing settlement through negotiation. Knowledge of the other side's evidence and its strengths and weaknesses often lead to conferences which can preclude an adversary procedure.

Because of these benefits, the regulations grant the right to either party to prohibit the introduction of any evidence at the hearing that has not been disclosed at least five days prior to the hearing. However, like any right provided for in these regulations, this right can be waived if done so knowingly and voluntarily. Thus, evidence obtained a couple of days before the hearing can be introduced if the other party permits it. The right belongs to the parties, not the hearing officer. In most cases, nevertheless, both sides should pass on to the other (1) all the documents they will introduce; (2) a list of witnesses they will call; (3) a brief summary of what each witness will testify about.

E. Record of the Hearing.

Parents (and schools) have the right to obtain either a written or electronic verbatim record of the hearing at no cost. However, both written and electronic recordings have their drawbacks. Written records created by court stenographers and transcribed by them are usually highly accurate and dependable but are expensive. Electronic records, usually obtained through audio tape recorders, are much less expensive but are subject to the unreliability of mechanical devices. If tape recordings are made, the person responsible for monitoring the recording should make a sound check of each new tape.

F. Written Decisions.

The written decision of the hearing officer or panel represents his or her evaluation of all the facts and evidence presented during the hearing. At a minimum, the final report should first contain those facts that the hearing officer has accepted as true. Thus, if the parents contend that the child is of average intelligence and the school contends he or she is retarded, the hearing officer must conclude and state who is correct (or decide that something else is true). Second, the report must contain the decision of the hearing officer with regard to the issue contested. Thus, if the point of contention is placement within a regular class (perhaps the school's proposal) or placement in a nonpublic school facility for learning disabled children (perhaps the parents' counter-proposal) the hearing officer must state what he or she considers to be the most appropriate placement for this child in the light of the law.

---

[46] *See* F. James, *Civil Procedure* 184 (1965).

But, these two elements actually only comprise the bare bones of an acceptable written report. To better fulfill this provision, the following outline for a decision is suggested as a means of evaluating whether the hearing officer has rendered an adequately informative decision:

1. A summary of the dispute that has led to the hearing.

2. The position and major contentions of the school district.

3. The position and major contentions of the parents.

4. Findings of fact based on the oral and documentary evidence presented at the hearing.

5. The final decision.

6. The rationale for the decision, grounded both in the facts deemed to be true and the proper application of law controlling in this case (primarily P. L. 94-142 and the regulations implementing § 504 of the Rehabilitation Act of 1973).

The following may serve as a possible concrete model of a final decision:

IN THE MATTER OF DORESS CUPE

Background

On February 24, 1978 a hearing was held at the administrative offices of the Morra County Board of Education to decide a number of issues in contention between the parents of Doress Cupe and the Morra County Independent School District. The Cupes were represented by Helen Byrrel, an attorney with the Morra County Legal Services Clinic; the school system was represented by Stander Chardick, an attorney with the Morra County Attorney's Office.

Doress is a 12 year old child presently attending the Duncan Academy, a private school for multiply handicapped, academically deficient children. If she were enrolled in the county system, she would be in the 7th grade at the Beery School.

The hearing was initiated by the parents who challenge the school's proposed diagnosis and placement of their child. The Cupes contend that Doress is a multiply handicapped child. They assert that she is severely learning disabled, has speech articulation problems, hearing difficulties produced by an allergic reaction that reoccurs intermittently and without warning, motor coordination problems which make her awkward and unable to write legibly, and that she has some emotional difficulties. Finally, they suspect that she may be mildly retarded. The school contends that Doress is a singularly handicapped child with only a learning disability and that the most appropriate placement for her is in a regular classroom with supplementary reading services provided for one hour a day with a learning resource teacher in a group of five other children.

For the first three grades in the public school system, Doress performed well and was on grade level. However, in the fourth, fifth, and sixth grades she made no progress in reading at all. In the beginning of the sixth grade, Mr. and Mrs. Cupe filed a request with the Morra County IDS for nonpublic school tuition, claiming that the public school did not have an appropriate program for her (Parents' Exhibit 2). The school turned down that request (School's Exhibit 1) on the ground that an appropriate program was available at Beery School. The Cupes then proceeded to obtain an independent medical and psychological evaluation of their child which showed that Doress has a learning disability, possible minimal brain injury, speech and hearing problems, and an I.Q. score of 69 (Parents' Exhibit 7). They then reapplied for nonpublic school tuition, attaching the report to the application (Parents' Exhibit 3). Morra again denied the request (Parents' Exhibit 4) on the same ground that it did so previously. At that point, on March 1, 1977 the parents withdrew Doress from the public school and placed her in Duncan Academy where she is now. Attempts by the State Department of Education to mediate and negotiate settlement from April to June 1977 failed. On September 10, 1977 the Cupes filed a formal request for a hearing under § 121a.506 of the regulations implementing P. L. 94-142 § 615(b)(2) (Parents' Exhibit 9). After a number of mutually consented to delays, this hearing was held on February 24, 1978. The school filed 11 documents and the parents filed 38 documents all of which are attached to this decision. In addition, the school presented oral testimony from the following witnesses:

1. Clia Neelson, M.A., Coordinator of Special Education for Morra County IDS.
2. Con Pegley, M.S., Doress' sixth grade teacher at Beery School.
3. Armin Valdemn, Ed.D. School Psychologist for Morra County IDS.
4. Jaret Crimmy, M.S., Resource Room Teacher for Morra County IDS.

The Cupes presented the oral testimony from:

1. Richard Wegan, M.A., Special Education Consultant for Morra County IDS.
2. Mr. Tate Cupe, Doress' father.
3. Doress Cupe, the child in question.
4. Shiela Onnix, Ed.D., the Head of the Duncan Academy.
5. Violet Nussan, M.A., Doress' present teacher at the Duncan Academy.
6. Fred Skinner, Ph.D., Chief Psychologist for the Exceptional Children's Unit of University Hospital.

Findings of Fact

Based on the documents and the evidence presented at the hearing, I find the following:

1. Doress' word recognition skills are at the third grade level.

2. Her reading comprehension is at the fourth grade level.

3. She is of average intelligence, but probably not of bright normal ability. The School's obtained score of 69 is an invalid measure of her intellectual ability because the psychologist failed to take into account Doress' speech articulation problems.

4. She has an intermittent hearing loss caused by an allergy of no discernible etiology which, when present, would make it difficult for her to hear her teacher unless she was less than 10 feet from her.

5. She has no significant emotional or behavioral difficulties except for some shyness and occasional bouts of crying. She was, however, teased by her sixth grade classmates at Beery School because of some moderate malformation of her jaw.

6. She has difficulty eating without food spilling from her mouth because of poor muscle control.

7. She has mild-to-moderate motor control problems which makes her awkward and ungainly.

8. She has severe speech articulation difficulties, particularly with the "s" and "z" sounds and voiced and unvoiced "th" sounds. When she talks quickly, which she often does, she is hard to understand.

9. The Morra County IDS has the facilities for remediating Doress' academic difficulties, as does the Duncan Academy.

10. The Morra County IDS has the services of a speech clinician available three days per week. This clinician could see Doress once a week for one-half hour. The Duncan Academy employs a full-time clinician who has and can continue to see Doress one-half hour a day three days per week. Doress needs speech therapy at least two days per week.

11. Morra does not have a physical therapist nor a gym teacher trained to remediate the kind of motor difficulties Doress has. The Duncan Academy has a gym teacher who can work with Doress for one 40-minute period per week.

12. Morra has a comprehensive art and music program; Duncan has neither.

Conclusions of Law

1. Doress is a multiply handicapped child as defined by P. L. 94-142 regulation 121a.5(b)(5) and State bylaw 29.07.

    a. She is learning disabled as defined by P. L. 94-142 regulation § 121a.5(b)(9) and State bylaw 30.01.
    b. She is hard of hearing as defined by P. L. 94-142 regulation § 121a.5(b)(3) and State bylaw 30.03.
    c. She is speech impaired as defined by P. L. 94-142 regulation § 121a.5(b)(10) and State bylaw 30.05.
    d. She has gross motor difficulties as defined by State bylaw 30.08.

2. Her proposed class placement at the Beery School is inappropriate. State bylaw 31.05 requires that children possessing Doress' handicapping conditions be placed in self-contained classrooms with no more than 10 children taught by a teacher certified to instruct multiply handicapped children and by a teacher's aide. The school proposes to place her in a regular classroom of 30 children with no aide. Instruction in a resource room 5 hours per week devoted solely to remediating her reading difficulty is insufficient.

3. The parents' present placement for Doress in the Duncan Academy, while providing the appropriate academic facilities is also anadequate in that it does not meet the intent of P.L. 94-142 § 612(5), its implementing regulations § 121a.550, and regulations implementing § 504 of the 1973 Rehabilitation Act § 84.34, all requiring that handicapped children be educated to the maximum extent appropriate with nonhandicapped children.

Decision and Rationale

Therefore, it is the decision of the hearing officer that:

1. Doress Cupe is a multiply handicapped child.

2. She be placed in a special education program and provided related services in

the Morra County Independent School District. This program should contain, at a minimum, the following –

a. Placement in a self-contained classroom for children with severe learning disabilities in which there is no more than 10 children. This classroom will be taught by a teacher trained to educate multiply handicapped children and by a trained teacher's aide.
b. Physical therapy twice a week for 30 minutes each. If the school cannot employ a trained therapist, it must provide such service privately at no cost to the parents.
c. Speech therapy with a person trained in speech articulation problems twice a week for 45 minutes each.
d. The attention of a teacher during all eating times who can help Doress control her eating habits.
e. A gym, art, and music program with age-equivalent classmates who are not handicapped.

3. The school review Doress' program at least every three months. This decision reflects the hearing officer's view that any program for Doress should meet both her academic and social needs. While Morra IDS has excellent teaching personnel who can remediate Doress' problems, they have failed to evaluate her multiple handicaps correctly. The Duncan Academy also possesses the facilities necessary to help Doress academically but continued placement at the school will prevent her from greater and necessary involvement with nonhandicapped children her age. Such involvement is crucial for children entering adolescence. In the light of both federal and state laws which seek to normalize a handicapped child's education to the fullest extent possible, I deem it essential that Doress attend public school. Her handicapping conditions are not so severe or disabling that she requires placement in a school which caters to multi-handicapped children only. However, while the potentail facilities at Beery are appropriate, the school's proposed education plan for Doress is inadequate. I have thus ordered the school to provide appropriately the instruction noted above. Failure to implement these additional services will lead to a revision of this decision to the end of granting the Cupes nonpublic school tuition to an appropriate private placement. I will retain jurisdiction of this matter for six months to monitor implementation of this decision.

Part (b) of § 121a.508 grants parents two additional rights. Unlike Part (a), the school has no equivalent rights here. First, parents can choose whether or not they wish to have their child present at the hearing. While the school system or the hearing officer may want to discuss the parents' decision in this regard, the final determination is theirs. Second, it is for parents to determine whether they wish to have the hearing open to the public or closed. At a closed hearing only participants and observers of the parents' choice may attend. To make sure that privacy is preserved, the hearing officer should place a sign on the hearing room door. The hearing itself should be in a closed space that can be shut off without interfering with the normal routine of school personnel. The school library, for example, is an inappropriate place for a closed hearing while the school board conference room would be satisfactory. For an open hearing, the school should arrange for a room large enough to accommodate spectators.

Additional Procedural Elements

There are two components to hearing rights that neither P.L. 94-142 itself nor the implementing regulations address directly. These two components are the burden of proof and the standard of proof, both of which are an inherent part of any hearing, whether administrative or judicial.

Burden of Proof

The burden of proof has two meanings. One concerns the burden of persuading the hearing officer as to which party is correct; the other concerns the duty of producing evidence (alternatively, the burden of going forward with the evidence). The first is called the persuasion burden, the second the production burden.

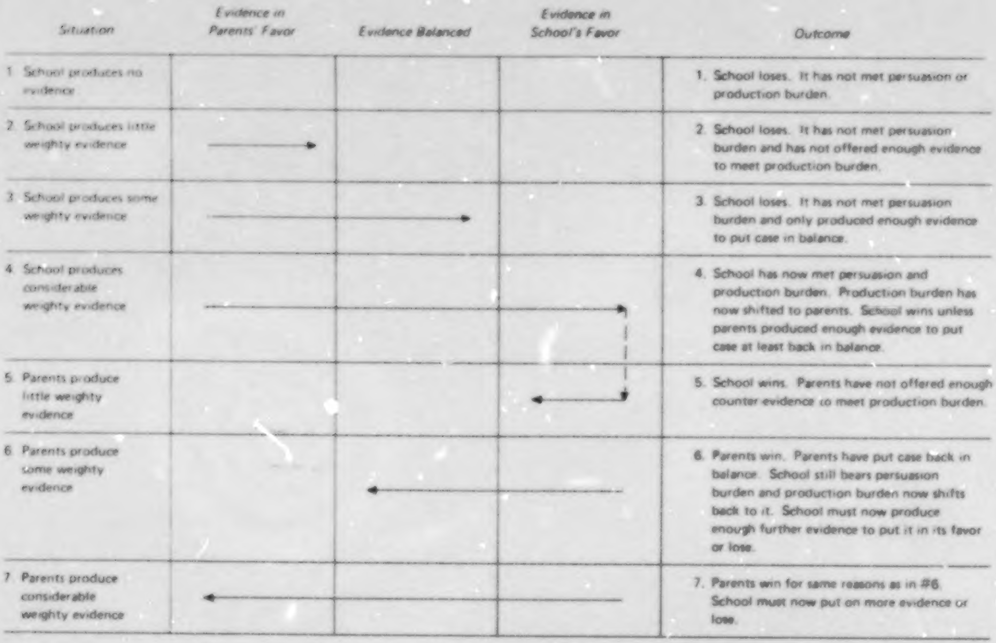
The *persuasion burden* is fixed. One of the parties has the original and continuing duty to persuade the hearing officer that its position is more well-founded than the other. Whoever has the persuasion burden bears the risk of nonpersuasion. For example, if the school system has the persuasion burden, and they produce no evidence at all by remaining silent, they will lose. However, rarely, if ever, does the one bearing the persuasion burden remain silent. The more usual situation is one in which both sides have produced equally weighty evidence. In such an instance, when the evidentiary scales are perfectly balanced, whoever bears the persuasion burden loses.

The other aspect of burden of proof is the production burden. The production burden shifts over the course of the hearing. Let us suppose again that the school bears the persuasion burden. If they remain silent, therefore, they lose as the school has failed to carry its persuasion burden. To prevent the loss the school bears the initial burden of producing evidence. Thus, the school puts on its case through documents and witnesses. Assume it has produced rather weighty evidence. While it continues to bear the persuasion burden, the production burden has now shifted to the parents. If they do not counter the school's evidence with some of their own, at least to the point of making the evidence equally convincing, the parents lose. The parents must produce enough evidence to bring things back to a position of parity.

Figure 1 may help to make concrete the relationship of persuasion and production burdens.

Figure 1

POSSIBLE OUTCOMES IN SITUATION WHERE SCHOOL BEARS PERSUASION BURDEN



Situation	*Evidence in Parents' Favor*	*Evidence Balanced*	*Evidence in School's Favor*	*Outcome*
1. School produces no evidence				1. School loses. It has not met persuasion or production burden.
2. School produces little weighty evidence	→			2. School loses. It has not met persuasion burden and has not offered enough evidence to meet production burden.
3. School produces some weighty evidence	—	→		3. School loses. It has not met persuasion burden and only produced enough evidence to put case in balance.
4. School produces considerable weighty evidence	—	—	→ ↓	4. School has now met persuasion and production burden. Production burden has now shifted to parents. School wins unless parents produced enough evidence to put case at least back in balance.
5. Parents produce little weighty evidence			←	5. School wins. Parents have not offered enough counter evidence to meet production burden.
6. Parents produce some weighty evidence		←	—	6. Parents win. Parents have put case back in balance. School still bears persuasion burden and production burden now shifts back to it. School must now produce enough further evidence to put it in its favor or lose.
7. Parents produce considerable weighty evidence	←	—	—	7. Parents win for same reasons as in #6. School must now put on more evidence or lose.

BEST COPY AVAILABLE

The chart on the preceding page graphically illustrates the importance of determining who bears the persuasion burden. Only when the evidence is in favor of the one who bears the persuasion burden will that party win. No federal statutes relevant to the topic (i.e., P. L. 94-142, P. L. 93-380, 1973 Rehabilitation Act) specifically addresses itself to the issue of who will bear the persuasion burden in all hearings brought under § 121a.506-121a.500. There is only one instance in which the federal government has made it clear on whom the persuasion burden falls. Section 84.34 of the regulations implementing § 504 of the Rehabilitation Act of 1973 states: "A recipient [the school system] shall place a handicapped person in the regular educational environment operated by the recipient *unless it is demonstrated by the recipient* that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily." The emphasized phrase indicates that when the school proposes to place a child out of the mainstream, the burden is on it to prove that removal is warranted.

Thus, while the persuasion burden, by regulation, is on the school in the one instance where it is seeking to infringe on the principle of the least restrictive environment, there is no general explicit rule as to the persuasion burden. However, on November 11, 1974, the Aid to States Branch of the Bureau of Education for the Handicapped, offered guidelines to states who were then attempting to implement the requirements of P. L. 93-380. Although they do not have the weight of law, these guidelines asserted:

> The burden of proof as to the appropriateness of any proposed placement, as to why more normalized placements could not adequately and appropriately serve the child's educational needs, and as to the adequacy and appropriateness of any test or evaluation procedure, will be upon the local agency.

Many states have voluntarily enacted legislation putting the burden of persuasion on the school in placement hearings.[47] All courts which have considered the matter have put the burden of persuasion on the school.[48] Aside from considerations of statutory authority and legal precedent, practical considerations dictate that the burden of proof be borne by the party who has at its disposal greater resources and easier access to verification of the issues in question. In the case of hearings with regard to the identification, evaluation, or placement of handicapped children or the provision of a free appropriate public education the party with the peculiar means of knowledge is certainly the school system. The school has at its disposal instant access to all pupil records and to information and opinions held by the teachers involved, as well as a thorough knowledge of school resources:

---

[47] *See* Finkelstein, "Educational Placement Hearings for Handicapped Children: Who Should Bear the Burden of Proof?" for a survey of state statutes and related data on file with the Developmental Disabilities Law Project, Univ. of Md. School of Law, Baltimore, Maryland 21201.

[48] *See, e.g., LeBanks v. Spears,* 60 F. R. D. 135 (E. D. La. 1973); *Mills v. Board of Educ. of D. C.,* 348 F. Supp. 866 (D. D.C. 1972); *In re Downey,* 72 Misc. 2d 772, 340 N. Y. S. 2d 687 (1972).

> In this setting,. . . questions [regarding educational placement] can best be answered by school officials, and for that reason it makes sense to place the burden of justification with them. School officials, not parents or children, control the information upon which a given decision is based; school officials also determine the policies which the classifiers — teachers and counselors — carry out. They are thus in the best position to explain the rationale for any challenged placement.
> Kirp, D. Schools as Sorters: *The Constitutional and Policy Implications of Student Classification*, 121 U. Pa. L. Rev. 705, 786 (1973).

Standard of Proof

If schools are to assume the burden of persuasion, how persuasive do they have to be? Do they have to convince the hearing officer beyond a reasonable doubt that their proposals are appropriate? If not, how weighty must their evidence be? All these questions go to the standard of proof. There are three accepted tests of standard of proof. In criminal cases, the state must prove its case "beyond a reasonable doubt" to win a conviction. In other situations such as deportation hearings or when the I.R.S. wants to assess penalties for income tax fraud, the courts have developed a standard calling for "clear and convincing evidence" before the government can win its case. The lowest standard, and the one most often employed in civil (non-criminal, non-penalty) cases is the preponderance of the evidence. This is usually taken to mean that the party with the persuasion burden must produce the greater weight of the evidence but only slightly more weighty than the opposing party. Preponderance of evidence, however, does not refer to the number of witnesses nor to the quantity of evidence but rather to the convincing force of the evidence. One highly persuasive witness may be more convincing than several opposition witnesses. Thus, the preponderance of the means convincing the hearing officer that the existence of a fact is more probable than its nonexistence. For example, if the dispute is over a child's handicapping condition, the side who produces more convincing evidence will win on that issue. But, it should be recalled that if the evidence is equally weighty, the side with the persuasion burden will lose on that issue.

As with the burden of proof, no relevant legislation clearly indicates what the standard of proof should be in local or state hearings or state appellate proceedings. However, § 615(e)(2) of P.L. 94-142 does state that when an appeal is taken to a federal or state court after administrative review, the judge shall base his or her "decision on the preponderance of the evidence." It makes sense then, and there does not seem any countervailing reasons for doing otherwise, to use the same standard in all proceedings brought under the P.L. 94-142 regulations.

121a.509 – Hearing Decision; Appeal

This section simply states:

> A decision made in a hearing conducted under this subpart is final, unless a party to the hearing appeals the decision under §121a.510 or §121a.511.

This is an essentially introductory provision that needs little explanation. It may seem somewhat contradictory that a decision is both final and appealable but the confusion is easily cleared up. Unless either the parents or the school appeals, the decision of the hearing officer is final and decides the case. However, either the school system or the parents, as parties, can appeal from this decision. No other entity can appeal. For example, while an advocacy group for the handicapped may want the parents to appeal a losing decision to the state department of education or to the courts, they cannot force the parents to do so or take an appeal themselves. If the initial hearing is at the local level and state law so provides, appeal is taken to the state agency level. If the initial hearing is at the state level, than an appeal is taken to the appropriate federal or state court. It should be recalled that parents have the right to be informed of their right to appeal.

121a.510 – Administrative Appeal; Impartial Review

This section provides:

> (a) If the hearing is conducted by a public agency other than the State educational agency, any party aggrieved by the findings and decision may appeal to the State educational agency.
>
> (b) If there is an appeal, the State educational agency shall conduct an impartial review of the hearing. The official conducting the review shall:
>
> (1) Examine the entire hearing record;
>
> (2) Insure that the procedures at the hearing were consistent with due process;
>
> (3) Seek additional evidence if necessary. If a hearing is held to receive additional evidence, the rights in § 121a.508 apply;
>
> (4) Afford the parties an opportunity for oral or written arguments, or both, at the discretion of the reviewing official,
>
> (5) Make an independent decision on completion of the review; and
>
> (6) Give a copy of written findings and the decision to the parties.
>
> (c) The decision made by the reviewing official is final, unless a party brings a civil action under § 121a.512(sic)[49]

---

[49] The regulations as printed in the August 23, 1977 Federal Register cite § 121a.512 as the relevant section pertaining to civil actions. This is apparently an error. The correct section is § 121a.511.

This section pertains to appeals from hearings held at the local(or perhaps intermediate) educational agency level. Either the school system or the parents may request an appeal, although it is foreseeable that both parties might wish to appeal if the hearing officer's decision in some way aggrieved both. This possibility exists because the hearing officer's decision may be different than that advocated for by the parents and the school system.

While the regulation, in subsection (b) alludes to "the official" in the singular, it is recommended that the state administrative appeal be held before a hearing panel of at least three persons. A three-person hearing panel not only gives the review process the semblance of serious and scrupulous consideration but enhances the chances of fewer appeals to the courts. A 3-0 vote in favor of one party or another (or in favor of an alternative postion) creates a significant disincentive to apply for judicial review.[50] While judicial review is, of course, a right granted to both parties, as will be discussed more fully below, the child's status is ostensibly frozen during the pendency of all proceedings, including the administrative and judicial appeal. Thus, any procedure which enhances carefully considered, but speedy, outcomes is favored. The qualifications and training of the review panel, as well as the requirement of impartiality, must match that suggested in § 121a.507.

Tasks of the Appellate Tribunal

In hearing the appeal, the administrative tribunal (or officer) must perform six tasks:

1. Examine the entire hearing record. The tribunal should carefully read the transcript from below, or if there is no transcription, listen to the tape-recording of the hearing and take extensive notes. It must also read and review all documentary evidence offered by both sides.

2. Insure procedural safeguards afforded all parties at initial hearing. The reviewing panel can use the checklist described in § 121a.505 for this purpose. To insure maximal implementation of the requirement for fairness, notice, and the opportunity to be heard, in case of any failure by the school system or the hearing officer to afford parents full enjoyment of their due process rights, the reviewing panel should reverse any decision unfavorable to parents and require the local school system to hold a new hearing. This is a rather harsh rule and should be employed judiciously. It should not be used in cases of very minor or meaningless attenuation of due process rights. For example, it is possible that the school has failed to give parents access to every single document it has with regard to a child. If the undisclosed documents are irrelevant (that is, they do

---

[50] It is recognized that a 2-1 vote is not as likely to deter appeals. But a decision by a single reviewing officer, especially if it reverses the decision of the local hearing officer, is even less likely to do so.

not aid the hearing officer in coming to a decision about an issue in contention) or immaterial (that is, goes to a matter not in issue), the school system should not be penalized. But even one document, like a psychological report, may be highly significant. Failure of the school to disclose that record may be a fundamental omission.

The stringent remedy of requiring a new hearing when schools fail to protect procedural rights may be considered as too harsh. It is, however, a salutary rule. By heavily penalizing local education agencies when they abrogate rights, they will be less likely to do so again. At the very least, the reviewing panel must allow parents to exercise during the appeal any rights not granted during the initial hearing.

3. Seek additional evidence. The administrative appeal need not simply be a review of the record. Minimally, the regulations allow either side to present new evidence if that evidence is sought by the review board. As written, that leaves the introduction of new evidence up to the discretion of the board. However, it is recommended that review panels broaden that right to allow the introduction of additional evidence when offered by either party as long as it is relevant and material. The tribunal can ask for a brief summary of the offered evidence to see if it would be helpful but to insure that all sides have as full an opportunity to be heard, decisions as to materiality and relevance should be rather lenient.

In any case, this provision with regard to additional evidence indicates that an appeal is not only a review of the written record. The regulation provides the opportunity for a mini-hearing where new witnesses or documents can be introduced. When additional evidence is offered in this hearing context, all the hearing rights discussed in § 121a.508 pertain.

4. Allow oral or written argument. This provision supplies a third method for arriving at a decision on appeal. First, the hearing panel can review the record. Second, it can hear or admit new evidence, both documentary and oral. Thirdly, it can hear oral arguments and read written briefs. The latter is the traditional method of review used by appellate courts. Usually, attorneys for either side will write briefs – essentailly well-researched, well-organized arguments – urging (depending on the party) reversal or affirmance of the decision below. The party who won below will try to persuade the reviewers why the decision was correct. The party who lost will try to show ways in which the decision was incorrect. The losing party's brief will be a particularly helpful way in aiding the appellate tribunal locate procedural errors, as well as highlighting disputed findings of fact and conslusions of law. Relying on those briefs, representatives for both sides then have a chance to present orally their major arguments. At this point, the review panel can, and should, ask questions. These questions may be used to seek information as to facts, ask for fuller explanations of the representative's position, or question certain points of law or be directed at particular legal

arguments, especially their logic.[51]

5. Render an independent decision. The review panel is not bound by the decision below or by the positions proffered by the parties on appeal. It can come to an independent result, modifying the decision of the hearing officer below. It can reclassify the child, change the recommended program, or completely restructure the identification, placement, or evaluation of the child. Because the reviewers are not bound by the decision below, it is again suggested that responsibility for this independent decision be borne by more than one person.

6. Make written findings and arrive at a decision. The responsibility of the reviewing officers in this regard is the same as that of the hearing officer described in § 121a.508(a)(5). The model written decision presented there can be applied here very appropriately. However, it is particularly important for the reviewers to not only state their conclusion but to explain why they decided to keep, modify, or restructure the decision below. A full description of the case is especially important at this administrative review because under subsection (c) of this section, either party can bring an action to the state or federal court. Adequate judicial review depends on a sufficiently complete record from the administrative agency.

Many states have developed in statutory form, an Administrative Procedures Act (APA). The APA will usually state in some detail how administrative agencies, like state departments or boards of education, must proceed when they review the findings and decisions of lower level agencies, like local school systems. Those who serve on reviewing panels under § 121a.510 should study their state's APA and follow its provisions to the extent that it complies with the minimal requirements of § 121a.510. When state and federal rules conflict, the federal rules predominate if the state rules afford fewer rights to participants.

121a.511 – Civil Action

> Any party aggrieved by the findings and decision made in a hearing who does not have the right to appeal under § 121a.510 of this subpart, and any party aggrieved by the decision of a reviewing officer under § 121a.510 has the right to bring a civil action under section 615(e)(2) of the Act.

This section pertains to two classes of persons: (1) Parties to a hearing at the local education agency level who, because of state law or regulation, are not provided review at the state level; (2) Parties to a hearing at the state education agency level who wish to appeal the decision of that agency. In both instances, the "aggrieved party" may bring an action in the appropriate court for judicial review. The nature of this action is controlled by § 615 of P.L. 94-142 which is incorporated by reference into the regulations. The pertinent part of § 615 reads:

---

[51] A helpful source for those who will hear or prepare oral and written arguments is "Introduction to Advocacy" (2d ed.) prepared by the Board of Student Advisors of Harvard Law School and published by Foundation Press, Mineola, New York.

> Any party. . shall have the right to bring a civil action with respect to the complaint presented pursuant to this section [i.e., identification, evaluation, placement, provision of free appropriate public education], which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate. § 615(e)(2), P.L. 94-142.

To adequately implement this provision, the following should be noted:

1. The party wishing to appeal the decision below can bring this civil action to either the appropriate state court or the federal district court. The district court is the trial level court in the federal system.[52] The appropriate state court will be defined by state statute, regulation or in the Administrative Procedure Act. If none of this is true, the state department of education should request the legislature to pass a statute naming the court in which judicial review under P.L. 94-142 should be brought.

2. The court will review the records of all prior hearings. This includes both the hearing at the local level and the review at the state level (if any). The courts will not usually want to listen to tapes of those hearings. Thus, almost always the school system will be responsible for providing transcription of either tapes or stenographer's record. It is important that the decisions of the hearing officer and reviewers be complete, organized, and informative.

3. The court can hear additional evidence. As with the state level appeal, the court can hear more evidence, making this action, in part, more like a trial than a simple review. The court can hear additional evidence either at its own request or at the request of one of the parties. It is also possible for the court to send back the case to the state or local agency if it feels that the record is inadequate so that the agencies can hear additional evidence. This is time-consuming,

---

[52] The phrase in § 615 with respect to "amount in controversy" is necessary to conform to federal rules of civil procedure. Unless an exception is made (as in this law) parties in some federal disputes must have claims for more than $10,000 to be eligible to be heard in federal court. Under P.L. 94-142, it does not matter whether there is any money at stake or if it is, what the amount in controversy is.

embarrassing, and most important, can substantially delay the child's right to a free appropriate education program. Thus, it is important that hearing officers allow for a full, broad opportunity for each side to offer evidence.

4. The decision of the court will be based on the preponderance of the evidence. (See discussion of standard of proof in § 121a.510).

5. The court can provide for any appropriate relief it wishes. The court is not bound by the decisions and recommendations granted below. As with the reviewing panel of the state tribunal, the court can modify or reconstruct the education program ordered below, as well as affirm what has been decided.

6. Though not stated in the Act, if the rules of the court so provide, parties may be asked to write and submit briefs and present oral argument on issues selected by the court.

121a.512 – Timeliness and Convenience of Hearings and Reviews

This section states:

> (a) The public agency shall insure that not later than 45 days after the receipt of a request for a hearing:
>
> (1) A final decision is reached in the hearing; and
>
> (2) A copy of the decision is mailed to each of the parties.
>
> (b) The State educational agency shall insure that not later than 30 days after the receipt of a request for a review:
>
> (1) A final decision is reached in the review; and
>
> (2) A copy of the decision is mailed to each of the parties.
>
> (c) A hearing or reviewing officer may grant specific extensions of time beyond the periods set out in paragraphs (a) and (b) of this section at the request of either party.
>
> (d) Each hearing and each review involving oral arguments must be conducted at a time which is reasonably convenient to the parents and child involved.

Of all the sections pertaining to procedural safeguards this has been the most controversial from the local and state educational agencies' point of view because of the relatively short timelines § 121a.512 provides. The local agency must come to a decision *45 days* after it receives a *request* for a hearing by parents. The state reviewing body must render a decision *30 days* after it receives a *request* for review.[53]

---

[53] The courts run on their own schedules and it is impossible, if not unconstitutional, for DHEW to mandate deadlines for their review.

While the timelines, on their face, may seem restrictive, in reality they should not be. In one large state which has heretofore required final decisions in 35-50 days from the time of request, in over 300 local hearings there have only been eight requests of deviations from the deadline. In most instances, it should not be difficult to meet the times set in the regulations because the school system should have all of its records and material in order by the time a hearing is requested. Local systems will have had their own case conferences in which the identification and evaluation materials will have been scrutinized, a handicapping condition agreed on, and a tentative educational placement decison made. After that they will have met with parents to relate to them the findings and proposals of the case conference and to develop an individual education plan. It is at that time that disagreements between the school and the parents which could eventuate into a hearing will surface. Thus, by the time parents file a complaint, there is very little substantive preparation the school need do. The only items left will be procedural ones, e.g., employ a hearing officer, schedule a room, arrange for a recording. For hearings on the state level, almost all documents will be prepared, the final decision at the local level will have been rendered and written, and the only hurdle will be transcription of the recording at the local level.

Suggested timelines are as follows: Local level – Hearing held within 20-30 days of request; decision rendered within 10-15 days of hearing; State level – Hearing held within 20 days (to allow adequate review of record below); decision rendered within 7 to 10 days.

With proper preparation, state and local school systems should be able to comply rather comfortably with the time deadlines. In cases where additional evidence is being gathered (as in a state appeal) or if some unforeseen delay occurs, the regulations clearly provide for extensions at the discretion of the hearing or reviewing officer § 121a.512(c). But such requests should be particularized and the reason given for the delay. Hearings themselves usually take no more than a day.

Finally, the regulations place the burden on the school system of arranging a hearing at a reasonable time for the parents and the child. The absence of the word "mutually" before convenient implies that the school may have to rearrange its schedule to accommodate family schedules. However, the presence of the word "reasonably" does provide some safeguards for the school. But, it should be prepared for hearings on evenings and Saturdays if parents work and, for good cause, cannot arrange for a day off.

121a.513 – Child's Status During Proceedings

This section requires that:

> (a) During the pendency of any administrative or judicial proceeding regarding a complaint, unless the public agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her present educational placement.
>
> (b) If the complaint involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school program until the completion of all the proceedings.

The purpose of speedy timelines in § 121a.512 becomes apparent in this section. For the most part, the child will stay in the program he or she was in when the initial proceeding began *throughout* all proceedings. The regulation uses the term "pendency" of the proceeding to describe the period in which the child's status cannot change. Thus, the status quo is maintained *while* the initial hearing is going on, *while* the administrative review is held, and *while* the civil action is taken.

There are some carefully restricted exceptions to the rule preserving the child's status quo. School systems have the right to remove handicapped children from their present program even during the pendency of proceedings when they substantially disturb the functioning of other children in that program. Comments to both the implementing regulations to § 504 and to P. L. 94-142 indicate when such removals may be made.

The explanatory comments to § 504[54] state that "where a handicapped student is so disruptive in the regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment." Under those conditions, by definition, regular class placement is not appropriate and the child could be placed in another program. However, the disruption conceivably could be the result of poor classroom management techniques rather than irremediably disturbing conduct on the part of the child. Thus while the child could be removed from the regular classroom *temporarily*, such removal itself could be an issue at any hearing in which parents are challenging the school's placement decisions. Eventually, within the context of that hearing, the school will have to produce evidence of substantial disruption, as well as, its good faith efforts to remediate the disturbing behavior in the regular classroom.

In a comment to § 121a.513, P. L. 94-142 regulations also permit a school system to use "its normal procedures for dealing with children who are endangering themselves or others." In this case, the child's program is not changed during the pendency of the proceedings. Rather, the school may use its usual emergency procedures for temporarily removing children from the classroom (or the school) when they become so dangerous to themselves or others that physical safety is at stake. Nevertheless, while schools do have the right to remove children who are a threat, such action should be taken only after procedures which comport with the Constitution and state and local laws are complied with. These regulations do not require parental consent for removal under these circumstances, even during the pendency of proceedings. But, because such action does abrogate the parents' statutory right to consent, the meaning of "endangering" will be strictly and narrowly construed and, as a result, such actions on the part of the school should be relatively rare.

---

[54] *See* 42 Federal Register 22691 (May 4, 1977).

Returning to the more routine case, it is conceivable that the child's educational program could be changed between hearings. This would conform to the literal language of the regulation. However, schools and parents should seriously consider the disadvantages of this practice. Many sudden and dramatic shifts disrupt the stability and continuity of instruction and may well do so in the child's life generally. It is a much better idea and enhances compliance with the entire spirit of the law to develop rather short deadlines for deciding when and if the parents or the school system will take an appeal. It will probably reasonably satisfy all the interests at stake if both parties are given from 5 to 10 calendar days to decide. Of course, the school must inform parents of this deadline in advance of the initial hearing. But once having established this deadline, the school legitimately can place the child in the program ordered by the hearing officer, if parents fail to meet it. The same procedure can be used after the state administrative review.

There are more compelling considerations when a child is not in school at all. In this situation it may be more important for a child to receive some education than to worry about possible future shifts. Even though there may be a dispute between the school and the parents with regard to the particular type of educational program, a child out of school must be provided with some instruction. Placement, however, is contingent upon parental consent. This aspect of the regulations (Subsection (b)) may create some situations that require analysis:

1. The school proposes to place a handicapped child but the parents refuse to enroll the child. This will be a rare situation because it has been education agencies which have tended to exclude certain children from public school, not parents. But, it is possible that the school will offer a program that the parents reject and yet the parents are not providing alternative education. Under these conditions, school systems may want to consider filing neglect proceedings under applicable state law if they believe that failure, even temporarily, to enroll the child will be damaging. Further, parents may be in violation of compulsory education laws if they provide no education at all and may thus be liable for civil or criminal penalties.

2. The parents of a nondisturbing handicapped child request a particular program but the school proposes either a different one or refuses to permit entry

to the school at all. Refusing access to a nondisturbing child, regardless of handicap is, of course, a violation of P. L. 94-142 and thus that avenue is not open to the school. When there is simply a disagreement about initial placement the school might wish to negotiate a temporary settlement to minimize changes in educational status between hearings. But, if attempts at compromise or negotiation fail, it will probably be helpful if schools accede to parental request during the completion of all proceedings. That will insure maximal implementation. Minimally, however, any admission into a school program will be acceptable if parents consent to entrance generally. The regulations require parental consent only to admission to school, not to a particular program.

3. The parents of a disturbing handicapped child requests a particular program but the school proposes either a different one or refuses to permit entry to the school at all. There are somewhat different considerations when a child may be harmful to other children. While there is a duty to provide some kind of education, such education can be provided at home, in a hospital or in an institution. Clearly, these placements are least preferred because they do not comport with the intent of the law to teach children in a setting most like a regular classroom, but they may be appropriate in some cases. Such a setting may be agreeable to parents during the pendency of proceedings. But, the decision to provide other than public school instruction should be made very warily. The school should have solid evidence to support its concern that the child is genuinely physically destructive or dangerous. Without it, it is recommended that the school attempt to place the child in a public school program and then rely on other existing remedies if such placement does not work out. All states have procedures for managing disruptive and dangerous children and they can be employed legitimately if a handicapped child endangers the safety and health of other children. But, suspension should certainly be a last resort and schools, even if they do suspend, must provide alternative means for the handicapped child to receive an education.

Many of the problems this section raises may be handled through negotiation and compromise. Successful understanding between parents and the school is essential here if the child's education is to be disturbed to the least extent possible.

121a.514 – Surrogate Parents

This relatively neglected provision reads:

> (a) *General*. Each public agency shall insure that the rights of a child are protected when:
> (1) No parent (as defined in § 121a.10) can be identified;
> (2) The public agency, after reasonable efforts, cannot discover the whereabouts of a parent; or

> (3) The child is a ward of the state under the laws of the State.
>
> (b) *Duty of the public agency.* The duty of a public agency under paragraph (a) of this section includes the assignment of an individual to act as a surrogate for the parents. This must include a method (1) for determining whether a child needs a surrogate parent, and (2) for assigning a surrogate parent to the child.
>
> (c) *Criteria for selection of surrogates.* (1) The public agency may select a surrogate parent in any way permitted under State law.
>
> (2) Public agencies shall insure that a person selected as a surrogate:
>
> (i) Has no interest that conflicts with the interests of the child he or she represents; and
>
> (ii) Has knowledge and skills that insure adequate representation of the child.
>
> (d) *Non-employee requirement; compensation.* (1) A person assigned as a surrogate may not be an employee of a public agency which is involved in the education or care of the child.
>
> (2) A person who otherwise qualifies to be a surrogate parent . . . is not an employee of the agency solely because he or she is paid by the agency to serve as a surrogate parent.
>
> (e) *Responsibilities.* The surrogate parent may represent the child in all matters relating to:
>
> (1) The identification, evaluation, and educational placement of the child, and
>
> (2) The provision of a free appropriate public education to the child.

While this section appears last within Subpart E – Procedural Safeguards – the determination of whether a child needs a parent surrogate and his or her subsequent assignment is one of the first tasks the school system should accomplish when they suspect a child is handicapped. P. L. 94-142, other federal laws and laws in many states now secure a child's right, through representation by his or her parents, to full participation and fair decisions in the total process of identification, evaluation and placement, as well as, to a free appropriate public education generally. Under these laws, the assumption is that the parents will be available and willing to participate in this decision-making process, fully accepting the responsibility of representing the child's best interests. However, there are some situations in which the child will lack this kind of personal representation. The child will not have effective representation if he is a ward of the state or if his parents or guardians are unknown or unavailable. It is this child who needs a parent surrogate to safeguard his rights.

Situations in Which a Surrogate Should be Appointed

The regulations clearly indicate that there are three specific situations when the appointment of a parent surrogate is necessary:

1. When there is no parent (or one cannot be identified). However, the definition of parent in § 121a.10 is a rather broad one and is taken to mean not only a parent but "a guardian [and] a person acting as a parent of a child."[55]

---

[55] It does not include the State if the child is a ward of the State.

The explanatory comment which follows § 121a.10 states:

> The term 'parent' is defined to include persons acting in the place of a parent, such as a grandmother or stepparent with whom a child lives, as well as, persons who are legally responsible for a child's welfare.

Nevertheless, a child living in an informal guardianship arrangement, as with a grandparent or older sibling, may also need a surrogate parent. An adult with less than legal guardianship may not have a serious stake in advocating for the rights of the child, particularly in the case of a handicapped child who may be regarded as a burden and, therefore, shuffled from one home to another. Lack of legal status as a parent may also impede access to records as access rights are limited to parents, legal guardians, and parent surrogates. Thus, while a literal reading of the pertinent regulations do not necessitate the appointment of a parent surrogate in all "informal parent" situations, it is highly recommended. But, assuming other requirements are met, the informal guardian in an extended family situation should have the opportunity to be appointed as the parent surrogate and he or she should be the preferred candidate for that position.

2. When there may be a parent but the school, after reasonable efforts, cannot discover his or her whereabouts. The decision to assign a parent surrogate is not as simple as it appears on the surface of this regulation. Competing but fundamental interests are at stake in the process. On the one hand, the school must consider the right of the child to be represented when important decisions are being made about his or her life. On the other, the school cannot deny parents their right to the care, control, and custody of their children. The law does not look favorably on the abrogation of parental rights by outsiders. Certainly, it is not within the intent of these regulations to appoint parent surrogates when parents are uncooperative or merely unresponsive. Thus, while the best interests of the child may be paramount, the public agency seeking to replace a parent who may not be easily identifiable or locatable must make all diligent efforts to seek out the parent. The same notions of due process apply to parents rights here as they do when their children are labeled and placed. Before their right to care for their children and make educational decisions for them disappears, education agencies should notify them and give them the opportunity to be heard. Included later in this section are two pieces of legislation that may help school systems engage in this delicate task. Even if a parent surrogate is duly appointed, parents do not irrevocably lose the right to care for their children or advocate for their educational rights. Should they become known and/or available, they are to be given the right to resume primacy in fulfilling those rules.

3. When the child is a ward of the state. There are at least two situations in which children who are wards of the state would need the assignment of a parent surrogate.

a. Children in Residential Facilities

Children who are confined to institutions, detention homes, or other state facilities are under the guardianship of officials who, for various reasons, cannot effectively advocate the rights of the handicapped child in the educational decision-making process. These officials, as state employees, might be reluctant to demand of their employer (the state) the educational rights and services to which their wards would be entitled. The employee's adversary stance might jeopardize his or her own career. This potential conflict of interest is inherent in any situation in which the legal guardian has to simultaneously serve the interests of the ward (the handicapped child) and the interests of the employer (the state). Furthermore, a practical problem hinders effective representation of the child by a state official acting as legal guardian. State officials are frequently legal guardians for vast numbers of children; therefore, logistics and practical time constraints make it difficult to enforce the educational rights of any one of their wards.

Assignment of a parent surrogate is especially crucial in this situation as the regulation clearly prohibits "an employee of a public agency which is involved in the education or care of the child" from acting in the parental role.[56] Superintendents and directors of institutions are clearly ineligible.

b. Children in Foster Care

The appointment of a parent surrogate may also be necessary for children in foster care arrangements as effective representation of the child's interests may be precluded by the foster care arrangement itself. Consider, for example, a child who is a ward of the Department of Social Services and who is placed in a foster home. The foster parent provides the home and daily care but is not the legal guardian. The social worker for the state agency also shares the responsibility for the well-being of the child. The appointment of a parent surrogate appears necessary to fill the gap left by the court's division of the duties and responsibilities of guardianship in a foster care arrangement.

In the case of a child in foster care, it might be in the best interest of the child to assign to the foster parent the role of parent surrogate, particularly when the foster parent is likely to care for the child over an extended period of time. Although the foster parent is reimbursed by the state, the potential conflict of interest would be outweighed by the need for decision-making concerning the child to rest in the hands of a single person who knows that child well and is likely to act assertively in the child's best interest. Furthermore, the foster parent's autonomy is established by the relative independence of the Department of Social Services from the Department of Education. Finally, although state employees are unlikely to give effective representation because of the potential conflict of interest, it is reasonable to argue that the foster parent is not actually "employed" by the state as compensation is merely reimbursement for the expenditures made in caring for the foster child.

---

[56] However, this should not prohibit a state employee from becoming a parent surrogate. For example, a nurse in a residential facility may want to act as a parent surrogate for a parentless handicapped child attending public school.

Methods for Implementing a Parent Surrogate Program

The primary obligation of either the local or state education agency is to develop means whereby it will be able to determine whether a parent surrogate is needed and for assigning the surrogate once that determination is made. To assure consistency, it is recommended that the state department of education assume primary responsibility for developing a parent surrogate program. There are at least two ways to initiate this task: (1) informal development of procedures and rules by the state department; (2) passage of a parent surrogate statute by the state legislature.

The Council for Exceptional Children has suggested procedures and timelines that are of the informal variety.[57]

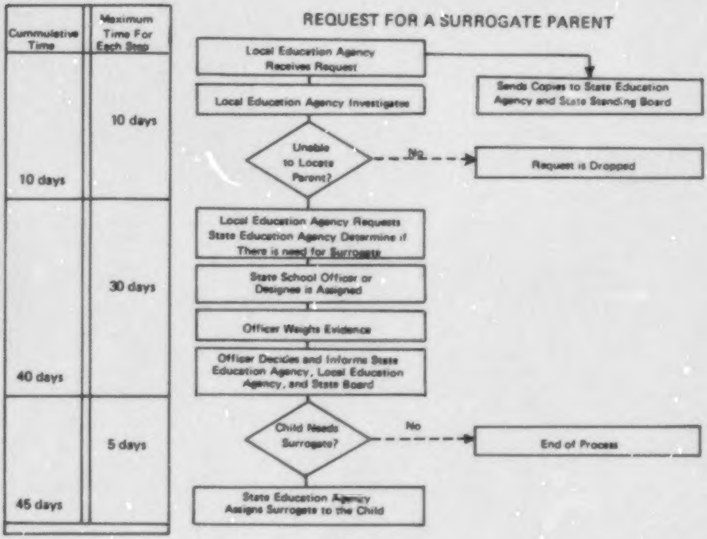
> Under the procedures proposed here, when it is determined that a child is a potential candidate for special education services, the parents or guardian must be informed that an evaluation is being considered. School personnel or others involved in the education or treatment of children (e.g., an employee of a residential school or hospital, a physician, or a judicial officer) may feel that a particular child is in need of special education services. To begin the evaluation process, the local education agency, informed of the need, must secure written permission from the parents or guardian. If the permission is not forthcoming and there is reason to suspect that this is due to the unavailability of the parents or guardian, the local education agency must make written inquiry to the adult in charge of the child's place of residence, as well as to the parents or guardian at their last known address. If these efforts find that the child is without a parent or guardian, or if one of the persons initiating the request knows that they are unavailable, then a request for a surrogate will be filed with the child's local education agency. Copies of the request should be sent to the state education agency and perhaps a state standing board or advisory committee on the handicapped.
>
> After a local education agency receives a request for the assignment of a surrogate, it must in turn request the state education agency, through the chief state school officer or his designee, to determine if the child in question is in need of a surrogate. It is suggested that those nominated as hearing officers fill this role, but acting as impertial agents rather than in their capacity as hearing officers. In reaching a decision, all available information, such as the child's records, the documented evidence of attempts to contact the parents or

---

[57] A. Abeson, N. Bolick, J. Haas, *A Primer on Due Process* 39-40 (1975).

guardian, and court records outlining previous legal action concerning the child's status, will be weighed. This study must take place within 30 days of the local agency's request, after which time notice of the decision will be sent to the local education agency, the state education agency, and the state board.

If the recommendation is that the child is in need of a surrogate,. the state education agency must assign one to the child within 5 days after receiving notice. Once the assignment is made, the surrogate will be responsible for representing the child, just as the parents or guardian would, through the complete decision making process. The responsibilities extend to the appeals procedure as well, if that occurs, and to at least the first review of the placement. The rights of the child are respected throughout this entire process, and it is important to remember that the surrogate assignment is always contingent on the child's acceptance of him. The child reserves the right to request a change of surrogate at any step along the way. [See summary flow chart below]


REQUEST FOR A SURROGATE PARENT
Cummulative Time
Maximum Time For Each Step
10 days
10 days
30 days
40 days
5 days
45 days
Local Education Agency Receives Request
Sends Copies to State Education Agency and State Standing Board
Local Education Agency Investigates
Unable to Locate Parent?
No
Request is Dropped
Local Education Agency Requests State Education Agency Determine if There is need for Surrogate
State School Officer or Designee is Assigned
Officer Weighs Evidence
Officer Decides and Informs State Education Agency, Local Education Agency, and State Board
Child Needs Surrogate?
No
End of Process
State Education Agency Assigns Surrogate to the Child

The informal route clearly comports with the intent of the regulation. However, the state may wish to consider implementation of the parent surrogate program through more formal means. Because of the complex legal rights of parents, children, the state and local education agencies, and the parent surrogates that are at stake, the formal legislative route is recommended. What follows are two statutory models that states may wish to employ or modify to suit their own individual needs. The first model places responsibility for appointment of the parent surrogate with the state board of education, the other with the juvenile court.

A. State board of education appointment (Art. 77, § 106D-1, Ann. Code Md. (Cum. Supp. 1977)).

§ 106D-1. Parent surrogates.

(a) *Definitions.* – (1) In this section the following words have the meanings indicated.

(2) "Board" or "local board" means a county board of education or the Board of School Commissioners of Baltimore City.

(3) "State Board" means the State Board of Education.

(4) "Parent surrogate" means a person, appointed by the State Board on the recommendation of a local superintendent of schools or his designee, as a child's advocate in the educational decision making process in place of the child's natural parent or legal guardian.

(5) "Child" means a person under the age of 21.

(6) "Educational decision making process" includes identification, evaluation, and placement, as well as the hearing, mediation, and appeal procedures provided for in the bylaws promulgated by the State Board of Education.

(7) "Unknown" means not known and not ascertainable by reasonable diligence or after reasonable inquiry.

(8) "Unavailable" includes being committed to a mental institution, incarcerated in a penal institution, otherwise unable to act as a child's advocate in the educational decision making process, or not present after good-faith efforts to obtain presence.

(b) *Request for assignment of parent surrogate – Generally.* – Any person may request the assignment of a parent surrogate for a child who may need special education if the child is a ward of the State, or if the child's parent or guardian are unknown or unavailable.

(c) *Same – Local superintendent, information and documents required.* – When a local superintendent of schools or his designee finds that a child may require special education and the child is a ward of the State, or the child's parent or guardian is unknown or unavailable, that superintendent or his designee shall request in writing that the State Board appoint a parent surrogate to represent the child in the educational decision making process. The request to the State Board shall include the child's name, date of birth, sex, domicile and residence, a statement explaining why the child meets the criteria for the appointment of a parent surrogate, documentation of efforts made to locate the parent if unknown, or the parent's present location if unavailable, and the name and qualifications of a proposed parent surrogate deemed appropriate to represent the child in the educational decision making process.

(d) *Appointment of parent surrogate.* – Upon the filing of a request for the appointment of a parent surrogate by a board, the State Board shall appoint a parent surrogate after a determination that the parent or legal guardian is unknown or unavailable and that the proposed parent surrogate is neither an employee nor an agent of the State Board or the local board involved in the education of the child and is otherwise properly qualified to serve as an advocate for the child. If the State Board finds that the proposed parent surrogate is not qualified to serve, it shall request that the local board make another nomination, or it may select and appoint one itself. Final selection shall be within ten days of a request by the local board. All costs for selection and appointment shall be borne by the local board.

(e) *Review of decision*. – Any person aggrieved by a decision of the State Board with regard to the selection and appointment of a parent surrogate may seek review of the decision in a court of competent jurisdiction.

(f) *Rules and regulations*. – The State Board shall promulgate rules and regulations regarding qualifications, selection, appointment, training, compensation, removal, and replacement necessary to implement this act in accordance with the Administrative Procedure Act, Article 41, §§ 244 through 256. (1977, ch. 359.)

The features of this statute are: (1) informal request by any person, including school personnel; (2) formal request by the local agency superintendent of schools; (3) formal appointment by the state board of education; (4) protection of natural parents rights through judicial review in state court; (5) delegation of authority by the legislature to the state board to write implementing regulations.

B. Court appointment (§ 10-94f-k, Conn. Gen. Stat. Ann. (1977)).

§ 10-94f. Definitions

As used in sections 10-94f to 10-94k, inclusive: (1) "Surrogate parent" shall mean the person appointed by a juvenile court, upon the recommendation of the secretary of the state board of education, as a child's advocate in the educational decision-making process in place of the child's natural parents or guardian; (2) "the educational decision-making process" shall include the identification, evaluation, placement, hearing, mediation and appeal procedures provided for in this chapter; (3) "unavailable" shall include, but not be limited to, a parent or guardian who is committed to a mental institution, incarcerated or otherwise unable to act as the child's advocate in the educational decision-making process.

§ 10-94g. Procedure to petition juvenile court for the appointment of surrogate parent

(a) When in the opinion of the secretary of the state board of education or his designee, a child may require special education and the parent or guardian of such child is unknown or unavailable or such child is a ward of the state, the secretary or his designee may petition the juvenile court in the district wherein such child resides for the appointment of a surrogate parent who shall represent such child in the educational decision-making process. The petition to the juvenile court shall be verified and shall include the child's name, date of birth, sex and residence, a statement explaining why the child meets the criteria for the appointment of a surrogate parent and the name of a proposed surrogate parent who is qualified to represent the child in the educational decision-making process.

(b) Upon the filing of a verified petition for the appointment of a surrogate parent, pursuant to subsection (a) of this section, the juvenile court shall cause a summons to be issued requiring the parents or parent or guardian of such child to appear in court for a hearing at the time and place named, which summons shall be served not less than seven days prior to the date of such hearing in the manner prescribed by section 17-61, and said court shall further give notice, not less than seven days prior to such hearing date, to the petitioner of the time and place the petition is to be heard. The cost of service of any such summons and any costs incurred in the giving of such notice shall be paid by the state board of education.

§ 10-94h. Appointment of surrogate parent

Upon a finding by the juvenile court that the child on whose behalf a petition was filed pursuant to section 10-94g meets the criteria for the appointment of a surrogate parent, such court shall appoint a surrogate parent for such child who shall be the proposed surrogate parent named in the petition or, if the court determines that such proposed person shall not be the surrogate parent, another person recommended by the secretary of the state board of education, upon the request of the court to make another recommendation, and agreed upon by the court. Such appointment shall be effective until the child reaches eighteen years of age, provided the secretary of the state board of education, not less than thirty days prior to the child's eighteenth birthday, may petition the court for an extension of the original order until the child graduates from high school or reaches the age of twenty-one years, whichever occurs first, and further provided that the secretary may petition the juvenile court at any time for the replacement of the surrogate parent. Upon the filing of any such petition, the court shall cause a summons to be issued requiring the child and surrogate parent to appear in court at the time and place named, which summons shall be served not less than seven days prior to the date of the hearing in the manner prescribed by section 17-61, and said court shall further give notice, not less than seven days prior to such hearing date, to the petitioner of the time and place when the petition is to be heard. The cost of service of any such summons and any costs incurred in the giving of such notice shall be paid by the state board of education. If the surrogate parent resigns or dies or for any other reason is unable to continue as surrogate parent for the child, the secretary of the state board of education shall, if he deems the appointment of a successor surrogate necessary, petition the court in the same manner as provided in subsection (a) of section 10-94g and the court shall give notice to the parent, parents or guardian in the same manner as provided in subsection (b) of section 10-94g.

§ 10-94i. Rights and liabilities of surrogate parents

The surrogate parent of any child appointed pursuant to section 10-94h shall have the same right of access as the natural parents or guardian to all records concerning the child, including, but not limited to, educational, medical, psychological and welfare records. No surrogate parent appointed pursuant to the provisions of said section 10-94h shall be liable to the child entrusted to him or the parents or guardian of such child for any civil damages which result from acts or omissions of such surrogate parent which constitute ordinary negligence. This immunity shall not apply to acts or omissions constituting gross, wilful or wanton negligence.

§ 10-94j. Regulations to establish qualifications and training procedures for surrogate parents

The secretary of the state board of education shall promulgate regulations

> establishing qualifications and training procedures necessary for any surrogate parent appointed pursuant to section 10-94h. The state advisory council on special education shall monitor the administration of the provisions of sections 10-94f to 10-94k, inclusive.
>
> § 10-94k. Funding of surrogate parent program
>
> All costs incurred by the state pursuant to sections 10-94f to 10-94k, inclusive, shall be paid from funds available under P. L. 93-380, entitled "An Act to Extend and Amend the Elementary and Secondary Education Act of 1965 and for Other Purposes," as may from time to time be amended and provided that under no circumstances will any funds of the state be expended to implement the purposes of said sections.

The features of this statute are: (1) initial investigation by the state board of education; (2) formal petition to the juvenile court; (3) procedures for determining the existence or availability of the natural parents through formal notice via summons; (4) statutory authority granting rights of access to records by parent surrogates (although § 121a.10 of the P. L. 94-142 regulations impliedly grants this right); (5) qualified immunity from suit for parent surrogates; (6) delegation of authority by the legislature to the state board of education to write implementing regulations.

Both of these statutes are excellent models and easily comply, well above minimal requirements, with the law. But they can be improved upon. Both depend in individual nominations for a parent surrogate. School systems can insure maximal implementation of P. L. 94-142 by developing a method for systematically identifying each child who qualifies for the appointment of a parent surrogate. Each system should undertake a census of all children currently enrolled in special education programs and related services to determine if each of them have a parent who is known and available or to determine if they are wards of the state. For children not yet enrolled these determinations could be made through the "child find" process. It is important to note that state and local agencies were responsible for having parent surrogate programs in place by October 1, 1977.

Selection and Training

Section 121a.514 only lists two criteria for the selection of surrogates: (1) no conflict of interest with the child to be represented; (2) possession of knowledge and skills so that representation will be adequate. These criteria should be fleshed out to insure maximal implementation. A person assigned as a parent surrogate should be:

1. An adult, preferably one who has been chosen by or is agreeable to the child in question. It might be helpful, in the case of strangers, for the child and potential surrogate to become acquainted and assess whether they are compatible before actual appointment is made final by the responsible body.

2. An independent person who is not an employee of the state or local agency involved in the education or care of the child.

3. One with no other vested interest that would conflict with the primary allegiance of the surrogate to the child.

4. Someone who is reasonably well acquainted with the cultural and language background of the child.

5. One who knows the educational system, special education laws, the legal rights of the child in relation to the system, and is aware of the causes, behaviors, and modes of valid intervention of the handicapped child he or she will represent.

To effectuate the last criterion, persons assigned as parent surrogates should receive appropriate training. As part of the training program, the following aspects should be covered:

1. Nature and needs of different handicapping conditions.

2. Available programs and options for handicapped children.

3. Responsibilities and limitations of the surrogate parent.

4. Sources of assistance available to the surrogate parent. (One suggestion in this regard is to have the consultative services of an attorney available, perhaps through the Planning and Advocacy System developed under § 113 of the Developmental Disabilities Act).

5. Comprehension of the laws related to the provision of a free appropriate public education and the identification, evaluation, and placement of handicapped children (See § 121a.507 for suggested list of statutory material).

6. Preparation and conduct of hearings, appeals, and civil actions. (This aspect, it would seem, is best done through role playing, simulation, and the observing of actual proceedings).

CONCLUSION

This lengthy document does not exhaust all possible procedures for implementing P. L. 94-142. While the author hopes it offers school systems at all levels many suggestions, agencies guided by the principles explained in this document should attempt to improve on these recommendations. It is the spirit of P. L. 94-142 that this document seeks to communicate, not autocratic, inflexible procedures.

SECTION III

Recommended Criteria and Assessment Techniques for the Evaluation by LEAs of Their Compliance with the Notice and Consent Requirements of P.L. 94-142

Lawrence Kotin

KOTIN, LAWRENCE. Mr. Kotin is a member of the Bars of New York, Maryland and Massachusetts. He is an instructor at the Eliot Pearson Department of Child Study (Tufts University), a specialist in law and education and consultant to the Massachusetts Federation for Children With Special Needs on a project to design and implement a "surrogate parent" system in Massachusetts. Mr. Kotin received his J.D. at Columbia University School of Law. He has been a guest lecturer at national, regional and state conferences on due process in special education; consultant to the Massachusetts Department of Education in writing the special education regulations for Massachusetts and assisting their implementation; special assistant on education and children's services to former Massachusetts Governor Francis W. Sargent and draftsman of the original models for Massachusetts Special Education law. Mr. Kotin has numerous publications relevant to P. L. 94-142, Procedural Due Process in Special Education and other manuscripts, articles and reports in the area of law and education.

INTRODUCTION

The purpose of this paper is to recommend criteria and assessment techniques which LEAs can use to measure their compliance with the parent notification and consent requirements of P. L. 94-142.[1] "Compliance," however, is a relative term. Thus, for example, the *degree* of compliance is frequently described by such terms as "minimum," "partial" or "full" while the *nature* or *quality* of compliance is often characterized by such normative terms as "bad faith," "token," "mechanical," "ineffective," "half-hearted," "effective," "good faith" and "real." In addition, seemingly neutral words such as "gradual," "phased" or "evolutionary" take on very definite positive or negative meanings when they are used in the context of a debate about the degree or quality of compliance.

Thus, in any discussion of compliance, the same terms will be used differently, and different terms will inevitably be used to describe the same situation, depending upon the vantage point of the observer, e.g., a parent, child, local, state or federal education official. For example, a local school official who uses certified mail to send a notice and consent form for an impending evaluation may believe that he/she is in "full compliance" with the requirements of P. L. 94-142, while the parent who fails to receive the form or who receives it but is unable to understand its contents and fails to respond in a timely manner may feel that the school official has "failed to comply" with the requirements of the law. A federal enforcement official, on the other hand, may decide that there has been "compliance with the letter of the law" but "non-compliance with its intent" and require additional efforts on the part of school officials. The phrases "full compliance," "non-compliance" and "token compliance" therefore, would have different meanings for each of the parties in this hypothetical case.

On a broader, more "political" scale, local and state officials responsible for adapting old systems and creating new ones to respond to the mandates of the new law may view compliance very differently from advocacy groups who view the new law as a vindication of their fight to prevent the denial of the civil rights of handicapped children and their parents – in particular, the right to an appropriate educational opportunity. Thus, for example, local and state officials may view compliance during the first year as being the *commencement* of an "evolutionary process" of developing regulations, guidelines and new systems, hiring new personnel, training existing personnel, fighting and winning opening skirmishes over budget allocations and increases, while advocacy groups may expect the new system to be *in full operation* by the end of the first year.

In addition, public officials and advocacy groups are not monolithic in their viewpoints. Thus, for example, school officials in different communities will vary significantly from each other in their attitudes toward compliance, as will local and state educational officials. Similarly, educational officials generally will undoubtedly have expectations for compliance which differ markedly from those of local and state officials, such as mayors, city and town managers, selectmen, state representatives and governors, who are not part of the "educational establishment" and who, therefore, view education as one of many competing priorities.

---

[1] References to P. L. 94-142 should be read to include the Regulations for the implementation of P. L. 94-142. If a reference is intended to be to the statute only or to the Regulations only, it will be so indicated when the reference is made.

Correspondingly, among advocacy groups, those representing parents who feel that their children were *denied* an educational opportunity under the previous system, such as the parents of black children who were incorrectly classified or of Spanish-surnamed children who were not provided with any bilingual services, may have different expectations than embattled white, middle class parents who feel that their children were *not properly served* by the old system but who were able, nevertheless, to secure for them an educational opportunity greater than that of the more disadvantaged children. Also, as in the case of the public officials, the attitudes and efforts toward compliance of the various advocacy groups will vary depending on their location and membership and the degree to which they are able to devote resources to special education as opposed to other priorities in the areas of education, children's rights and civil rights generally.

The object of this paper, therefore, is not to attempt to develop a single set of criteria for compliance and of assessment techniques with which all parties will agree. Rather, its purpose is to suggest a range of criteria and assessment techniques which takes into account the relative nature of the term "compliance," the many different concerns and points of view of the various constituencies affected by the new federal law and the variables which should be considered in designing a complex system such as that required for the implementation of the notice and consent requirements of P. L. 94-142. Thus, the suggested criteria and assessment techniques are presented as a continuum of possibilities, reflecting the author's opinion of the points on the scale from minimum to maximum compliance. The reader may rearrange those points or choose to ignore some of them to suit his/her own particular view of compliance.

The approach of the paper is to define the notice and consent requirements of P. L. 94-142, to analyze the reasons for those requirements and the context in which they are to be applied and to suggest criteria for compliance which satisfy those requirements, respond to their underlying purposes and blend as smoothly as possible into the existing system. Assessment techniques are then recommended to provide a system for measuring compliance with the established criteria.

CHAPTER I: THE NOTICE AND CONSENT REQUIREMENTS OF P. L. 94-142[2]

A. The Notice Requirements

The principal statement of the notice requirements is contained in sections 504 and 505 of Part 121a of the Federal Regulations. These sections combine the notices which apply to children who have not yet been in a special education program and who have been selected by an LEA for initial identification, evaluation or placement or some combination of these three steps in the process, and to children who are already in a special education program and who have been determined by an LEA to be potential candidates for a reevaluation or for a change in program. These notice requirements are directed toward the points in the special education process when an LEA is proposing to make a key decision about the educational status of a child. In addition, notice of the other steps in the special education process, such as the independent evaluation and the due process hearing, and of the rights of parents with regard to the entire process are required by reference through section 505(a)(1) of the Regulations which states that "the notice under § 121a.504 must include a full explanation of all of the procedural safeguards available to the parents under Subpart e".

Because the subsequent analysis will be examining the notice requirements which apply to each of the key decision-making points of the special education process, it is necessary to break down the general notice requirement of section 504(a) (1) and (2) into its component parts. The following notice requirements in subsection (a) apply to children who have not yet been in a special education program: notice of the proposed decision to identify the child as one who might require an evaluation (when the LEA "proposes to initiate . . . the identification . . . of the child" or "refuses to initiate . . . the identification . . . of the child."); Notice of the proposed initial placement decision (when the LEA "proposes to initiate . . . the . . . educational placement of the child" or "refuses to initiate . . . the . . . educational placement of the child."); and notice of the actual provision of the program (when the LEA "proposes to initiate . . . the provision of a free appropriate public education to the child" or "refuses to initiate . . . the provision of a free appropriate public education to the child.").

The following notice requirements in subsection (a) of section 504 apply to children who are in a special education program and who have been determined by an LEA to be potential candidates for a reevaluation or for a change in program: Notice of the proposed decision to reevaluate the child (when the LEA "proposes to initiate . . . the . . . evaluation . . . of the child." Presumably, the term "evaluation" would include a "reevaluation" pursuant to section

---

[2] References to notice and consent requirements refer to those requirement as they appear in the Federal Regulations and not as they appear in P. L. 94-142, itself, since the Regulations, in general, restate and supplement the requirements of the statute.

121a.534); notice of the proposed decision to change the placement decision (when the LEA "proposes to . . . change the . . . educational placement of the child" or "refuses to . . . change the . . . educational placement of the child."); and notice of the proposed decision to change the actual provision of the program (when the LEA "proposes to . . . change . . . the provision of a free appropriate public education to the child.").

Aside from the notice requirements contained in section 504(a), there is one other notice requirement relating to a key LEA decision-making point. This concerns attendance by parents at meetings which are held "for the purpose of developing, reviewing and revising a handicapped child's individualized education program" (section 343(a)). It requires that the LEA "take steps to insure that one or both of the parents of the handicapped child are present at each meeting or are afforded the opportunity to participate, including: (1) notifying parents of the meeting early enough to insure that they will have an opportunity to attend; and (2) scheduling the meeting at a mutually agreed on time and place" (section 345(a)). This notice requirement, like the ones in section 504(a), applies both to children who have not yet been in a special education program (where the meeting is for the purpose of "developing" an individualized education program) and to children who are in a special education program (where the meeting is for the purpose of "reviewing and revising a handicapped child's individualized education program."). Although this notice requirement does not appear in the "due process part of the Regulations" (Subpart E), it is as integral and essential a part of the procedures leading up to and following the development of the individualized education program as the "Subpart E" provisions and thus is an essential element of "due process."

1. The Content of the Notice

The required content of the notices mandated by section 504(a) is described in section 505. In the same way that section 504(a) groups together the various notice requirements which apply to the different stages of the special education process, section 505(a) combines the content requirements for all notices into a single requirement with several components. Thus, in developing a form to satisfy a particular notice requirement, school officials will be required to select the requirements in section 505 (a) which correspond to the specific notice form which is being prepared under section 504(a). For example, despite the mandate in section 505(a)(1) that a notice under section 504 contain "a full explanation of all of the procedural safeguards available to parents under Subpart E," it is apparent that only the *applicable* procedural safeguards should be included. Thus, if a notice relates to a proposed change in program for a child who has been evaluated previously and is in a special education program, the information in section 504(b) concerning the rights of parents to consent to a preplacement evaluation or an initial placement would be inapplicable and should not be included in the notice form, since the parts of the process requiring such consent have already been completed. On the other hand, information relating to the right of parents to an impartial due process hearing should they wish to contest the proposed change is fully applicable and should be included in the notice form. The required content of each notice form, therefore, will depend upon when the form is sent, i.e., at which stage in the special education process. This relationship between the timing of the sending of notice forms and the content of those forms will be discussed in more detail in a later section of this paper, since it is an area where school officials have a substantial degree of discretion in complying with the requirements of the law (see section III C, *infra*).

Assuming that the notice under section 504 is being given at the beginning stage of the special education process, i.e., at the point where an initial identification is at issue, the "full disclosure" provision of section 505(a)(1) would require that the notice form include a "full explanation of all of the procedural safeguards available to the parents under Subpart E." This would involve a description of the following rights of parents: (1) to "inspect and review" specified records (section 502); "to obtain an independent evaluation," subject to the right of appeal of the LEA (section 503); to consent or refuse to consent to a "preplacement evaluation" and an initial placement decision, with both consents subject to the right of appeal of the LEA (section 504(b) and (c)); to initiate an "impartial due process hearing" in specified situations (section 506); to have certain rights with respect to such a hearing (sections 507 and 508); to appeal the decision reached at that hearing (sections 510-513); to have certain guarantees with regard to the testing and evaluation materials and procedures which are used in the evaluation and placement of their child (sections 530-533 and 550-553); to have periodic reevaluations of their child (section 534); to have information relative to the policies and procedures of the state education agency in maintaining information concerning handicapped children (section 561); to have access to their child's records (sections 562-566); to amend or challenge information in their child's records (sections 567-570); and to consent or refuse to consent to the release of personally identifiable information about their child (section 571).[3]

In addition to this "total disclosure requirement," section 505 requires that the notice form include a description and explanation of what the LEA proposes to do or is refusing to do, with an accompanying description of alternatives which were considered and rejected and an explanation of the reasons for such rejection (section 505(a)(2)); "a description of each evaluation procedure, test, record, or report "the LEA used as a basis for its proposed action or refusal to act (section 505(a)(3)); and "a description of any other factors which are relevant to the [LEA's] proposal or refusal" (section 505(a)(4)).

---

[3] The right of a child without a parent or parent substitute to have a "surrogate parent" assigned is another "Subpart E" (section 514) requirement which will be discussed later in this paper (*infra*, section IV B.4).

Finally, section 505(b) requires that the notice be "written in language understandable to the general public" (section 505(b)(1)) and that it be "provided in the native language of the parent or other mode of communication used by the parent unless it is clearly not feasible to do so" (section 505(b)(2)). In cases where the native language or other mode of communication of the parents is not a written language, special steps are require to insure that the notice is received and understood (section 505(c)).

B. The Consent Requirements

Closely related to the notice requirements of P. L. 94-142 are the requirements for parental consent. The two principal provisions for consent are contained in section 504(b), which requires that an LEA obtain parental consent "before conducting a pre-placement evaluation; and [before] initial placement of a handicapped child in a program providing special education and related services." The interrelationship of the consent and notice requirements is apparent from the fact that "consent" is defined in such a manner as to insure that the parents are "fully informed of all information relevant to the ctivity for which consent is sought" (section 500). Thus, for "consent" to be acceptable under the Regulations, the parent must receive full notice of the purpose of the consent, "must understand and agree in writing to the carrying out of the activity for which his or her consent is sought" and must understand "that the granting of consent is voluntary . . . and may be revoked at any time" (section 500).

An additional consent requirement is contained in section 571 which provides for parental consent prior to certain types of disclosure and use of personally identifiable information about the child. This requirement and the two others already described constitute all of the consent requirements of P. L. 94-142.

C. Summary of the Notice and Consent Requirements

In summary, the principal notice requirements of P. L. 94-142 are set forth in section 504 of the Regulations (paragraphs (a)(1) and (2)) and are keyed to the major LEA decision-making points in the special education process – identification, evaluation, placement and program provision. Notice of the other steps in the process (e.g., independent evaluation and due process hearing) and the rights of parents with regard to the entire process are required by reference through section 505(a)(1) of the Regulations which provides for the notice forms to include "a full explanation of all of the procedural safeguards available to the parents under Subpart E". In addition, the Regulations provide in Subpart C (sections 343-345) for notice to parents of meetings held to make the key decisions referred to above. This Subpart C requirement is intimately related to the other notice requirements and should be treated as an integral part of those requirements despite the fact that it is not contained in Subpart E.

The major consent requirements are also contained in section 504 (paragraphs (b) and (c)). Since consent is defined as being "informed" and "voluntary" (section 500), parents must receive detailed information concerning the reason the consent is being requested. The consent requirements are keyed to two specific points in the process: (1) the preplacement evaluation and (2) the initial program placement. A third consent requirement, relating to release of confidential information about a child, applied to information which has been collected during the entire process.

CHAPTER II: THE PURPOSES OF THE NOTICE AND CONSENT REQUIREMENTS AND THE CONTEXT IN WHICH THEY ARE BEING APPLIED

A. Introduction

The purpose of the preceding chapter was to pinpoint and describe the notice and consent requirements of P. L. 94-142. This section will examine the background and purposes of these requirements with a view toward the development of criteria for evaluating compliance which reflect those purposes as well as the letter of the law. It will also discuss and consider the nature of the existing system into which the requirements are to be integrated, so that the criteria for evaluating compliance will reflect the needs of that system.

B. Background and Purposes of the Notice Requirements

The notice requirements of P. L. 94-142 were derived primarily from judicial models of due process rather than from educational theory and tradition concerning parent participation in school processes. Cases such as *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania* and *Mills v. Board of Education of the District of Columbia* applied notice and other due process protections to the special education process in order to protect the rights of children who are the subject of certain types of educational decisions which might drastically alter their lives. Typically, the requirements of due process are applied by the courts to areas of government activity which potentially threaten "important" interests of the individual which the court considers to be included within the meaning of the phrase "life, liberty or property" (which appears in the Fourteenth Amendment to the United States Constitution). For a variety of reasons, including numerous documented cases of misclassification, segregation and exclusion of handicapped children in public school and other settings, a number of federal courts and state legislatures, as well as Congress through P. L. 93-380 and P. L. 94-142, have applied the requirements of due process to special education.

At the core of due process is the requirement that the government give notice to the person who is the subject of the government action and that the notice describe the process which the government intends to follow and the rights of that person during that process. The reason for the notice requirement is to protect the rights of the individual by providing him/her with the information which is necessary to understand and, where necessary, to contest the actions of the government.

Although the primary impetus for the application of notice requirements to special education was from civil rights cases, the concept of notice has taken on a broader meaning in the special education context than was originally articulated by the courts. The judicial models of due process generally required notice of a proposed decision to change the educational placement of a child and of an opportunity to contest such proposed decision through the mechanism of a "due process hearing". P. L. 94-142 embodies this judicial requirement but also requires notice of earlier decision-making points in the process and of the right to parental involvement in the making of the placement decision. Thus, for example, parents must receive prior written notice of proposed decisions relating to the identification and evaluation of their child in addition to receiving prior notice of a proposed placement decision; also, they are entitled to receive notice of their right to participate in meetings involving the development of an individualized educational program (sections 344 and 345). Furthermore, parents are entitled to request a "due process hearing" to challenge these early decisions relating to identification and evaluation as well as to contest the actual placement decision. Thus, the concept of due process articulated by the courts has been greatly expanded by P. L. 94-142 to encompass the earlier stages in the process and to provide for parent involvement in the making of decisions.

While the requirement of the due process hearing is derived from judicial models of due process, the requirement of parental notice and involvement in the *pre-placement decision* stages of the special education process has its origins elsewhere. Specifically, educational policy-makers have determined that as a matter of educational practice, it is desirable to involve the parents at these early stages of the process. This determination is based primarily on the finding that the nature of handicapping conditions and the provision of programs and services for children who are handicapped are matters of such complexity which so intimately involve the life of the child at home as well as in school that the parents should be involved as much as possible as a source of information about the child, as a member of the decision-making team, and as one of those responsible for implementing the child's educational program.

Another reason for requirements of parental notice and involvement in the pre-placement decision stage of the process also is based on educational concerns about designing an effective special-education system rather than on judicial models of due process. Specifically, it is based on the practical goal of maximizing parental understanding and participation so that the relationship between home and school is a collaborative and informal one. Here, educational policy-makers have decided that this kind of relationship is most conducive to mutually agreed-upon decisions and reduces the need for the formal, adversarial procedures which are provided for in cases where parents and school officials are unable to agree on a decision relating to the identification, evaluation or educational placement of the child.

In summary, the principal purpose of the notice requirements of P.L. 94-142 is to protect the civil rights of parents and children in the special education process. This purpose and most of the notice requirements which implement it, are derived from judicial models of due process. A second purpose of the notice requirements, however, which has its origins in educational theory and practice, is to involve the parents and, "where appropriate", the child in making the initial placement decision. This purpose is best exemplified by the parental notice and involvement requirements which apply to the pre-placement decision stage of the process. A third major purpose of the notice requirements, also exemplified by the pre-placement decision notices, is the pragmatic one of minimizing future conflict and formal adversarial proceedings by maximizing mutual understanding and cooperation through parental notice and involvement requirements which apply early in the special education process.

C. Background and Purposes of the Consent Requirements

The purpose of the consent requirements of P.L. 94-142 is very different from that of the notice requirements. The notice requirements are geared toward providing the opportunity for involvement of the parents (and, "where appropriate", the child) in various stages of the special education process by making them aware of the nature of the process and of their rights within that process. The consent requirements, on the other hand, are designed to give the parents some direct control over the process by allowing them to prevent the process from going forward. The consent requirements, therefore, represent a more *potent* form of parental involvement than the notice requirements since failure to consent stops the process while notice, at most, merely allows for parental participation in that process. The consent requirements, however, also represent a more *limited* form of parental involvement than the notice requirements since the consent requirements apply only to the pre-placement evaluation and to an initial placement decision, while the notice requirements apply throughout the process.

The consent requirements of P.L. 94-142 constitute an acknowledgment by educational policy-makers that in the area of special education, the danger of invasion by the school of the prerogatives of the home are greater than in any other area of school life. This is undoubtedly because of the special "medical, psychological and social services" and testing and evaluation techniques which are applied to potential or identified handicapped children but not to the rest of the school population. The consent requirements, therefore, are designed to give parents some measure of direct control over this new area of "compulsory education."

D. The Context in Which the Notice and Consent Requirements are to be Applied

The special education decision-making process to which the notice and consent requirements are being applied is one which traditionally has been informal and carried out by educators and other professionals, such as psychologists and social workers. It has not been a process which has been subject to the formal scrutiny and review of parents, advocates and other persons outside of the "educational establishment." To the extent that parents have been involved, that involvement has varied from case to case and school system to school system and has been characterized by such terms as "participation" and "consultation" rather than "decision-making" or "consent." Thus, the notice and consent requirements of P.L. 94-142 represent a significant departure from past practices.

The notice and consent requirements seem particularly alien to the existing system because they are derived primarily from legal rather than educational concepts and because P.L. 94-142 does not describe how they will be integrated into the existing system. It merely mandates the new requirements and assumes that they will be implemented appropriately. As with any innovation, however, the new requirements will not be applied in a vacuum. Instead, they will be integrated into an existing and system and, hopefully, will serve the overall purpose of that system – the provision of an appropriate educational opportunity for each handicapped child.

E. Summary

The requirements of parental notice and involvement in the special education process were derived primarily from judicial models of due process in special education which required notice of a proposed change in a child's program and a formal, adversarial mechanism – the "due process hearing" – through which parents could challenge the decision to make such a change. P.L. 94-142 incorporated this model and expanded upon it by extending its application to the earlier decision-making points in the process and by requiring parental participation in the making of the placement decision as well as in challenging that decision through an adversarial hearing.

The decision to expand the application of the due process requirements in this way reflects a desire to involve the parents early in the process so that their knowledge of the child can be applied to the various decisions required during that process. In addition, such early involvement is designed to enable parents to exercise their due process rights as effectively as possible. Also, early involvement and opportunities for participation in the making of decisions are conducive to a collaborative, non-adversarial relationship between home and school. This type of relationship is most likely to avoid the necessity of formal due process hearings and to enhance the possibility of informal resolution of differences of opinion.

The consent requirements differ from the notice requirements, since consent is a prerequisite for the process to go forward while notice merely provides an opportunity for participation. Also, the consent requirements apply only to two decision-making points while the notice requirements apply throughout the process.

Both the notice and consent requirements are intended to be integrated into the total special education system. The challenge to educators is to implement those requirements in a way which will serve the overall purposes of the system, while guaranteeing the rights of parents in that system.

CHAPTER III: RECOMMENDED CRITERIA FOR THE EVALUATION OF COMPLIANCE WITH THE NOTICE AND CONSENT REQUIREMENTS

A. Introduction

This chapter will discuss the principal criteria, common to all notice and consent requirements, which are basic to a due process system which is designed to carry out both the letter and spirit of the law. At the outset, it is important to stress the fact that P.L. 94-142 does not present a *system* for the delivery of special education and related services. It merely sets forth a series of legal requirements and educational objectives, leaving it to school officials to modify old systems and design new ones to incorporate those requirements and objectives. The notice and consent requirements, therefore, are intended to be integrated into a total system rather than to be implemented as isolated requirements which are grafted onto a system which is otherwise complete.

Thus, a useful way to approach the problem of implementing the notice and consent requirements is to fill in the stark outline presented by the law and Regulations with a system which reflects an awareness and understanding of the judicial models and educational concerns from which the requirements were derived, the principal purposes of the requirements, the context in which they are being applied and the way in which they can be used to enhance the effectiveness of the special education system. This type of approach will help to make the requirements less burdensome and foreign to those who must implement them and less intimidating to the parents who are asked to respond to them.

B. Formal and Informal Steps In the Process of Giving Notice

Where notice is required in the judicial or legal context, it is rare that the requirement is satisfied in a vacuum, without reference to other procedures of a more informal nature which precede or accompany the formal notice. Thus, for example, in the case of a public school teacher whom an LEA would like to dismiss during the contract year, it would be highly unusual that a formal notice would be sent without substantial prior efforts to resolve the dispute, seek a resignation or discuss alternatives to dismissal, such as completion of the contract year and non-renewal of the contract. Even after formal notice was given, efforts would undoubtedly continue toward the goal of an informal settlement.

Similarly, the filing of a complaint in a court case and the serving of process on the party being sued (which is formal notice that the complaint has been filed) is generally a late stage in the legal process, following earlier efforts to settle the dispute. Furthermore, even after the complaint is filed and process is served on the party being sued, informal efforts toward settlement continue. In fact, the vast majority of all legal disputes are settled informally, either before the filing of a complaint and the serving of process (i.e., notice), or after the filing of a complaint and serving of process but before the case is tried at a formal hearing.

Thus, as these examples illustrate, formal notice is generally an intermediate or late step in the total process of resolving most legal disputes rather than a first contact between the parties. In fact, in most of these cases, by the time formal notice is given, the party receiving it has been made aware of the reasons for and contents of the notice through other less formal contacts such as meetings, discussions, telephone calls and conferences.

What is particularly awesome about the principal notice requirement of P.L. 94-142 is that it *appears* to be the first step in the parent-school relationship. The Regulations (section 504(a)) do not speak of prior, formal discussions, telephone calls, meetings or other "friendly" contacts between school officials and parents. Instead, they speak only of a "written notice" which satisfies a series of formal and detailed requirements regarding its content (section 505).

Informal procedures for the resolution of disputes, however, are both a desirable and indispensable part of any due process system. Their desirability is alluded to in the comment to section 506 of the Regulations, which encourages the use of mediation techniques prior to a due process hearing: "In many cases, mediation leads to resolution of differences between parents and agencies without the development of an adversarial relationship and with minimal emotional stress." Their indispensability stems from the practical consideration that if informal resolution of disputes were the exception rather than the rule in the various contexts in which due process is applied, the courts and administrative tribunals, such as local school boards and state education agencies, would be hopelessly bogged down in a morass of formal adjudicatory hearings. In addition, even when informal processes do not result in the resolution of a dispute, they serve to expedite its resolution by clarifying and focusing the issues to be decided at a formal hearing.

One qualification of the preceding paragraph, however, is important to remember: the informal processes should never be used "to deny or delay a parent's rights under [subpart E of the Regulations]." Thus, a clear line must be drawn where informal processes no longer are furthering the process of amicable resolution of disputes but, instead, are merely delaying or denying the right of parents to due process, as defined in Subpart E of the Regulations. Thus, school officials must be prepared to terminate informal discussions where they are no longer productive and where they are impeding the completion of the special education process by preventing parents from asserting their rights.

In designing criteria for the evaluation of compliance by LEAs, therefore, consideration must be given to the use of informal steps and procedures for the resolution of disputes, subject to non-interference with the formal due process rights of parents. The manner and extent of the use of these informal techniques will be based upon what is necessary and desirable for the effective implementation of the letter and purposes of the notice requirements and will be considered, in detail, in the sections of this paper where they are applicable.

C. The Timing of the Notices

The manner in which the notice requirements are stated in sections 504 and 505 of the Regulations raises several issues which must be considered in developing compliance criteria. The first issue concerns the timing of the sending of the notice. Section 504 states that notice must be given "a reasonable time before the public agency *proposes* to initiate or change the identification, evaluation or educational placement of the child. . ." etc. (Emphasis added.) This could be interpreted to mean that the notice must be given prior to a final decision on any of these matters or after a final decision but prior to the actual implementation of that decision.

Sending a notice after *a preliminary decision to decide whether to proceed* with one or more steps of the process is very different from sending a notice after *a final decision to proceed has already been made.* In the first case, only a preliminary and tentative decision has been made and the notice, therefore, provides the opportunity for parental participation in the final decision. In the second case, school officials have made a final decision to proceed and the notice merely allows the parents to *challenge* that decision by requesting "an impartial due process hearing." In this second case, parental participation in the formulation of the decision would be foreclosed unless the school officials agreed to reopen the question.

Thus, a basic issue in establishing criteria for the evaluation of compliance with the notice requirements is whether the giving of notice should be timed so as to permit parental input into the final decision *before it is made,* or merely to allow a parental challenge to a decision which is final. Referring to the three principal reasons for the notice requirements, it is apparent that each of these reasons would be furthered to a greater extent by a notice which precedes a final decision than by one which follows that decision. With regard to the first purpose — to protect the civil rights of the child and parents — it is evident that the earlier the parental involvement, the greater the likelihood that the parents will be able to effectively assert their rights. For example, the earlier their involvement, the greater the opportunity parents would have to secure information and assistance and, thus, to exercise their rights intelligently and to maximize their input. Similarly, with regard to the second purpose of the notice requirements — to involve parents as "professional partners" in the decision-making process — it is equally evident that the earlier parental information and knowledge can be obtained, the greater will be the likelihood of an informed final decision. In the case of the third purpose of the notice requirements — to establish an informal, collaborative relationship between home and school and to minimize later confrontation — it is also apparent that the earlier the involvement of parents the less the likelihood of an adversarial relationship triggered by feelings of surprise and indignation about being "excluded" from the process.

Furthermore, the earlier the involvement of parents, the greater the likelihood that the traditional parental attitude of trust and respect toward school officials will be preserved. Thus, from a "systems perspective" early and meaningful involvement of parents through "pre-decision notice" will facilitate the process of integrating parent input into the special education system, without seriously disrupting normal school processes and traditional home and school relationships.

A second issue raised by the manner in which the notice requirements are stated in sections 504 and 505 of the Regulations concerns the frequency with which notices should be given. For example, in the case of an initial identification of a child, the wording of the requirements would permit a single, "omnibus notice" to be given, informing the parents that the school "proposes" to identify, evaluate, develop a program placement and provide a program for their child. The notice would then describe all of the requirements of Subpart E of the Regulations and list the other information required by section 505 of the Regulations. It could be argued that this kind of "omnibus notice" would satisfy the letter of sections 504 and 505 since it would provide parents with prior notice of the entire process and with a description of their rights within that process.

Another way of interpreting the notice requirement, however, is that, in addition to an initial omnibus notice, a notice must be given prior to each step in the process. Thus, a supplement to an "omnibus notice" would be a series of separate notices, each specific to the step in the process which is being "proposed."

In terms of furthering the purposes of the notice requirement, it would seem that an "omnibus notice" alone would present parents with an inordinately large quantity of information to digest. Also, a notice of this size and complexity would probably have the effect of intimidating and confusing parents. Adding to this effect would be the lack of any subsequent notices while the process continues, assuming that an omnibus notice is not followed by any specific notices. Providing parents with a series of specific, limited purpose notices, therefore, would seem to be essential in meeting the three basic objectives of the notice requirements: to enable parents to understand and exercise their rights, to participate in the process and to work in collaboration with school officials. Furthermore, in terms of minimizing disruption of the existing special education system, specific notices would reduce the surprise and confusion of parents who are otherwise eager to trust and work with school officials.

A third consideration relating to the timing of the giving of notice is to give the notice at a point which corresponds with the likely time when the parents might invoke the right which is the subject of the notice. This is best illustrated by the right to an independent evaluation. Notice of this right could conceivably be given in one of at least three ways. It could be given as part of an "omnibus notice" at the beginning of the process; it could be given as part of a specific notice prior to an evaluation or a placement decision; or it could be given as a separate notice, both before an evaluation, as required by section 504 of the Regulations, *and after the evaluation,* since it is at this later point that the right to an independent evaluation would most likely be invoked (section 503(b) provides that: "A parent has the right to an independent educational evaluation. . . if the parent disagrees with an evaluation obtained by the public agency. . . ").

Thus, although the Regulations require notice to be given *prior* to certain "proposed" actions, in some cases the most effective notice might be one given *after* as well as prior to a particular action.

A fourth consideration relating to the timing of the giving of notice relates to the requirement that the notice be given a "reasonable time" before the LEA proposes to act. No specific times are suggested as guidelines for implementing this requirement. In general, it is important that time lines be developed which recognize the complexity of the matter which is the subject of the notice while taking into account the need for a process which moves along as rapidly as possible. Thus as a general rule, notice at least ten days prior to a proposed action would seem to be a minimum "reasonable time" while notice of more than thirty days would seem excessive.

D. The Form of the Notice

Regardless of when the notice is given, it is crucial that its contents be presented so as to be easily understood by parents. In part, this is mandated by the Regulations which require that the notice be "written in language understandable to the general public, and provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so." (Section 505(b)(1) and (2)). This requirement of simplicity and clarity is essential to all notices. Merely repeating the words of the law and Regulations will probably not satisfy that requirement. On the other hand, LEAs must be careful to insure that "simplified language" states accurately and fully the various requirements of the law and Regulations.

In addition to using "plain English" in a notice, it is important that LEAs consider other techniques for communicating the contents of notices. Although most notices will, of necessity, appear somewhat complex since a considerable amount of legal-type information has to be conveyed, it is possible to develop flow charts, diagrammatic outlines and other visual aids which facilitate understanding of the contents of the notice. In addition, a notice could be accompanied by a friendly letter which explains its purpose and provides the name and phone number of a school official who can provide additional information by phone or in person. The letter or notice might also provide the name of a parent organization, such as an association of parents of retarded children or of children with learning disabilities, which could provide information "from the parents' point of view." Through the use of these and similar techniques, the form of the notice can be softened and its contents made more comprehensible, thus furthering the purposes of the notice and strengthening the school-parent relationship.

E. The Manner of Delivery of the Notice

Another consideration related to the problem of effectively communicating the contents of a notice is the manner of its delivery. The Regulations state that an LEA must "give" written notice to the parents "a reasonable time" before the proposed action (section 504). No procedure for "giving" notice is specified.

In light of the principal purposes of the notice requirements and the goal of smooth integration of due process procedures into the special education system, it is essential that notice be given in such a manner as to fully inform parents of the nature of the special education process and of their rights in that process. To satisfy the letter of the notice requirement, an LEA would probably be required to send the notice by certified mail with a return receipt requested, since implicit in the "giving" of notice are both delivery and receipt or evidence of non-receipt. The use of certified mail with a return receipt requested would provide the LEA with evidence that the notice was sent and received (or not received if the letter is returned with an unsigned receipt).

As indicated in the previous section on the use of formal and informal techniques, the use of informal techniques together with the formal steps required by law can be the most effective way of satisfying the legal requirements and gaining the support and assistance of parents. Thus, for example, it might be desirable to precede the sending of a formal notice with a phone call or home visit to warn the parents that the notice is about to arrive. Receipt of a certified letter without such prior warning can be a frightening experience for anyone.

Another possible informal approach would be to have the notice delivered personally by a school social worker, counselor or other official. This would give the parents the opportunity to ask questions and relieve some of their anxiety while fulfilling the LEA's legal requirements of giving notice. Similarly, an opportunity for a visit at home or school to discuss the contents of the notice could be provided to the parents. Ideally, this should be communicated before or during the delivery of the notice in order to reduce the impact of receipt. If this is impractical, however, it could be communicated after the notice is delivered. Use of these informal techniques would soften the effects of the giving of formal notice and would further the goals of involving parents in a non-adversarial way while minimizing disruption of the normal special education process.

F. The Population To Be Served

An effective system of notice and consent must take into account the level of comprehension and diversity of the families who are being served. Thus, a uniform system of sending notice and consent forms with no additional effort might arguably satisfy the literal requirements of P.L. 94-142 but would undoubtedly fail to carry out the purposes of those requirements.

With regard to the level of comprehension of the average family receiving a notice or consent form, it is essential to assume a general lack of sophistication and knowledge and to proceed accordingly. Few parents are experts in special education or in the laws relating to education. Therefore, the system must be designed with the average parent in mind.

From this starting point it is necessary to develop a system which reflects the needs of the variety of families served by a particular LEA. A notice process which may be effective with one family may be totally ineffective with a different family in different circumstances. Based upon the experience of other due process systems, it is apparent that factors such as education level, income, family structure (e.g., one or two parent families), English-speaking ability and race all must be considered if the process is to be effective.

Thus, given a direct correlation between the level of education of the parents and the ability to understand a notice form, if the notice were sent to a family where the parents (or parent in a single parent home) have completed only high school, it would very likely appear inscrutable at best, resulting in confusion, panic, anger and a tension-filled phone call to the LEA, SEA or to a lawyer. If the form were sent to a family where the level of education were less than high school, it would undoubtedly provoke similar feelings and reactions, but heightened in degree by greater feelings of ignorance and powerlessness.

To reduce the adverse impact of the receipt of a notice form by a family with a low educational level, it would be particularly desirable to use informal contacts and simplified explanations of the special education process. In addition, local organizations of parents of handicapped children might be contacted to provide advocacy services by "peers," i.e., parents of handicapped children living in the same neighborhood who can communicate the meaning of the notice. Also, special efforts might be made to secure legal services for these parents.

Similarly, assuming a correlation between the income level of the family and its ability to understand the contents of the notice, a notice sent to a "poverty level" family (i.e., a family receiving public assistance or with an income below the poverty level as defined by the Bureau of Labor Statistics) would very likely be perceived as an enormous threat on top of a pile of overdue bills, "shutoff notices" from utility companies, court summons from the landlord or a department store and other documents evidencing the effects of poverty. This would be particularly true in a family with several pre-school age children, all of whom are probably suffering from some degree of physical or emotional deprivation resulting from inadequate housing, clothing, nutrition or medical care. In addition, poverty level families are frequently without a car, telephone, or funds for a babysitter making it unusually difficult for them to respond to a notice.

As in the case of families with a low level of education, informal contacts and "peer communication" can be very effective in communicating the contents of the notice in such a way as to further the purposes of the notice requirements. In addition, however, LEAs must be particularly ready to make home visits to poor families which are "housebound" due to a lack of resources. In the alternative, LEAs should be prepared to arrange for babysitting and transportation to enable a low income parent to attend a meeting at school to discuss a notice form.

Another family characteristic which correlates directly with the ability of parents to understand and respond to a notice is the number of parents in the family. Single parent households, in general, are less able to respond effectively to the receipt of a notice than are two parent households. This is for the obvious reason that a single parent has a great many more constraints and demands on him/her than two parents who can share the day to day responsibilities of living. A two parent household, however, may have problems similar to that of a single parent household where there are severe marital problems or where long and unusual working hours makes one spouse unavailable most of the time.

As in the case of families with a low educational or income level, LEAs should make special efforts to involve single parent or "problem" two parent households through such techniques as telephone calls, home visits, evening meetings and meetings at school with babysitting provided during the meeting.

Another critical family characteristic requiring special attention by an LEA is the English-speaking abilityof the family. Families whose primary language is not English present particular problems for an LEA since these families have all of the problems of other families receiving the notice plus the additional problem of not being able to understand English. This factor is explicitly recognized by the Regulations for P.L. 94-142 which state that all notices "must be provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so." (Section 505 (b)(2).) Although the meaning of the qualifying phrase "unless it is clearly not feasible to do so" is unclear, it is reasonably certain that all LEAs, at a minimum, will be required to use a notice form which has been translated into the native language of the family.

In addition, however, lack of English-speaking ability is often symptomatic of isolation from and ignorance and fear of the mainstream of the society and its institutions. Therefore, families whose primary language is not English will require special attention if the purposes of the notice requirements are to be effectively implemented. Such special attention might include the use of a bilingual social worker, community aide, or representative of a local parents' association to deliver and explain the notice and to be involved in other informal meetings and contacts between home and school.

The lack of integration into the mainstream of society which frequently characterizes families whose primary language is not English (particularly if their access to housing is limited by inadequate funds) is also characteristic of many black families who live in communities which are racially segregated. As in the case of non-English speaking families, these black families tend to view the school with a higher degree of fear and apprehension than than middle class white families, since the school personnel frequently reflect the values of the white, middle class culture. For this reason, LEAs will have to give special consideration to communicating notices to black families living in segregated communities. Such consideration might include the use of black social workers, aides and community representatives to deliver and explain the notice forms and, as in the case of families whose primary language is not English, to be involved in other informal meetings and contacts between home and school

In summary, LEAs interested in designing a notice system which effectively implements the three principal purposes of the notice requirement and which facilitates rather than disrupts the special education process will have to be aware of and be responsive to the diverse characteristics of the families they are serving, with regard to such factors as education level, income, family size and structure (e.g., number of children and parents), English-speaking ability, race, cultural segregation and a variety of other less prevalent but equally significant factors (such as parents with a severe handicap). When families have one or more of the "special characteristics" described in this section, LEAs will have to develop special approaches to insure that the notice given to these families is as effective, in *fact* as well as theory, as the notice given to other families. Ideally, those special approaches will include the use of social workers, aides and community representatives; of bilingual or black personnel, where necessary; of informal conferences and meetings prior to, during or after the delivery of the notice; of meetings outside of school hours, in situations where it is impossible for parents to be available during school hours; of provisions for transportation and child care, where lack of such provisions would prevent a parent from attending a meeting; and of other similar techniques which will insure effective notice to *all* families, regardless of their particular circumstances.

G. Active Versus Passive Attitudes Toward the Notice Requirements

It is evident from the proceeding discussion on various essential criteria for a due process system that giving notice which fulfills the spirit as well as the letter of P.L. 94-142 and which minimizes disruption of the normal special education decision-making process, requires a substantial effort and commitment to achieving the purposes of the notice requirements on the part of school officials. It also requires a policy of reaching out to families which are chronically difficult to involve in the special education process. In general, it requires an active and positive attitude toward communicating to and involving these families and a willingness to live with a certain level of frustration and disappointment when parents do not respond or respond in ways that are different from what may have been the "desired" response.

The difference between an active and passive attitude can be illustrated best by the following hypothetical case:

> A principal receives a referral for an evaluation from a teacher and must give notice to and receive a consent from the parent of the child who is to be evaluated. The family is composed of a mother and three pre-school age children. The family is receiving public assistance from the welfare department, is without a car or telephone and has no allotment for babysitting expenses. The family lives in substandard housing in a poor, rundown part of town. The mother is twenty four years of age and dropped out of high school in the tenth grade to give birth to her first child. The mother is semi-literate, white and English speaking. She is deeply concerned about the welfare of her children.

In this case, the principal could send a notice form by certified mail with a return receipt requested and a consent form enclosed (for the preplacement evaluation) and fulfill the minimum notice requirements of P.L. 94-142. Continuing the hypothetical case:

> The mother receives the notice form, signs the receipt but does not return the consent form which is included with the notice. The reason she does not is that she is unable to understand the reason for the consent form or the notice, is frightened by both and feels unable to write a letter or to otherwise communicate to the school. Also, she has to take two of her children to the hospital for treatment of severe infections caused by inadequate nutrition.

It is unclear what further action a principal must take in this case. The Regulations provide for a due process hearing to decide whether an evaluation should go forward without parental consent, but seem to limit this to cases when the parents refuse to consent rather than fail to respond (section 504(c)(1) and (2)). In any case, the principal in this hypothetical case considers two courses of action, with neither being a particularly desirable one in terms of providing an appropriate educational program to the child: (1) do nothing; or (2) request a due process hearing.

It is evident that a passive attitude in handling this case will result in a parent who is not *effectively* informed of her rights, who will be unable to participate in the special education process and who will fail to consent to an evaluation as the result of ignorance or fear or a combination of the two. If free legal aid is available, this type of parent is likely to become desperate and to involve a lawyer at a relatively early stage of the process. Involvement of the lawyer would increase the likelihood of an adversarial relationship between home and school.

Another approach, which could be taken in this hypothetical case and which is illustrative of an active and positive approach toward communicating with the home would be to have a school social worker, the child's teacher or a community volunteer visit the home, prior to the giving of notice, to explain that the child is in need of an evaluation and to describe the special education process, emphasizing the role of the parent in that process. At this time or later, the formal notice, along with simple written explanations and graphic illustrations could be given and questions could be answered. Advice could be given about the availability of assistance from an advocate, community worker or representative of a parents' organization. Additional advice could be given about child care arrangements which might be made to enable the mother to attend the meetings specified in the notice. All other aspects of the notice, including the consent requirements, could be explained at this time. It is probable (but by no means certain) that this approach would be more likely to fulfill the spirit of the notice and consent requirements than the "passive" approach described in the previous paragraph.

H. Additional Considerations Relative To The Consent Requirements

All of the above-described general considerations which apply to the notice requirements apply with greater force to the consent requirements. For example, parents who react with fear and anxiety to the receipt of a notice form will very likely react to a consent with form with more intense feelings ranging from extreme suspicion to total hostility. This is because the consent form, unlike the notice form, requires a specific response — a signature on the bottom line. While an adverse or passive parent reaction to a *notice* form may ultimately undermine the continuation of the process, a similar reaction to a *consent* form will bring the process to a grinding halt. Thus, it is essential that the delicate issue of consent be handled with particular care.

Furthermore, implicit in the consent requirement is the requirement of clear notice to the parents of the purpose of the consent and of the right to grant or withhold it. In fact, the Regulations for P.L. 94-142 define "consent" as meaning that "the parent has been fully informed of all information relevant to the activity for which consent is sought. . ., understands and agrees in writing to the carrying out of the activity. . ., and understands that the granting of consent is voluntary. . .and may be revoked at any time." (Section 500.) Thus, special efforts will be required to ensure that the consent is an "informed one."

In summary, the consent requirements can be fulfilled by the sending of the consent form and the receipt of that form by the LEA. The spirit of P.L. 94-142, however, requires that the consent be "informed" and "voluntary." In addition, the delicate nature of the problem of securing consent and the potential disruption of the process which would be caused by parental failure or refusal to consent require a specialized approach similar to that suggested above in the case of the notice requirements.

I. System-wide Responses to the Notice and Consent Requirements

1. Training of Personnel

As indicated earlier, the nature and extent of parent involvement required by both the letter and spirit of P.L. 94-142 represent a significant departure from the traditional home and school relationship. Systemic changes of this magnitude inevitably require modifications in attitude and philosophy by many of the individuals responsible for the integration of the changes into the existing system. To some extent, these modifications will occur naturally as the changes in the system go into effect and become standard practice. On the other hand, the transition to the new system could be greatly facilitated by training programs for personnel which sensitize them to the issues and concerns involved in developing a constructive home and school relationship. In particular, it would be very useful for school personnel to be involved in role-playing sessions so that they can begin to see the school system from a parent's perspective. Also, it would be highly desirable to have sessions devoted to discussions about techniques which might be used to encourage parents to be involved in the special education process and to feel welcome in the school environment. Some of these training sessions might best be given by representatives from parents' organizations. The use of these kinds of training sessions will greatly enhance the effectiveness of the various forms of informal techniques which have been suggested as ways to implement the underlying purposes and goals of the notice and consent requirements.

2. Public Information and Educational Programs Directed to Parents

In a similar manner, effective implementation of the notice and consent requirements could be greatly enhanced by public education and information programs designed to inform parents of the nature of the special education process and the role of the parent in that process. In particular, parents could be given the opportunity to view the process from the school's perspective and to understand some of the constraints on school personnel who are responsible for making the process work. These kinds of informational and educational programs would serve the purposes of increasing parental understanding of the system, reducing the element of surprise and confusion when individual parents are suddenly involved in the system through receipt of a notice or consent form and sensitizing parents to the problems of school personnel, thereby helping to reduce the likelihood of future adversarial relationships.

J. Summary

In summary, an effective system for implementing the notice and consent requirements of P.L. 94-142 is one which integrates the notice and consent requirements into the present system in such a way as to maximize the benefits of parental involvement, while informing parents of their rights in the process. This can best be done by adding to the formal requirements of P.L. 94-142 a series of informal procedures and techniques which convey the required information to parents in a non-threatening, helpful manner.

This type of approach involves providing parents with accurate and clearly stated information at times when the information is particularly relevant to a particular stage of the process. It also involves providing the information sufficiently in advance of decisions to allow meaningful parental input into these decisions.

Furthermore, an effective system is one which recognizes the diversity of the families to be served and responds to that diversity through the use of special procedures and techniques designed to provide effective notice equally to all families, regardless of their particular circumstances and characteristics. It is also a system which reaches out to parents on an active basis, recognizing that all parents are "outsiders" to the system and that very few have any knowledge of special education or legal procedures.

Finally, an effective system is one which uses systemwide training programs and public information efforts to train and inform school personnel and parents so that as many people as possible are sensitized to the requirements of the special education process.

CHAPTER IV: CONSIDERATIONS PARTICULAR TO THE KEY DECISION-MAKING POINTS AND TO THE OTHER COMPONENTS OF THE SPECIAL EDUCATION PROCESS

The previous chapter focused on the principal criteria, common to all notice and consent requirements in P.L. 94-142, which are relevant in implementing the notice and consent requirements of P.L. 94-142. This section will examine the special education process with a view toward emphasizing specific concerns which apply to the various components of that process. For purposes of analysis the special education process is divided into two parts: the key LEA decision-making points listed in section 504(a)(1) and (2) of the Regulations and the other components of the process, such as the independent evaluation and due process hearing, which are included in the notice requirements by reference, through section 505(a)(1).

A. Considerations Particular to the Key LEA Decision-Making Points in the Process

1. The Early Decision-Making Points

As indicated earlier, P.L. 94-142 expanded the judicial models of due process in special education by extending it to the earliest decision-making points in the process – the identification of the child and the pre-placement evaluation. In particular, parents are required to be given prior notice of these decisions to be permitted to consent or to refuse to consent to a pre-placement evaluation and to attend and participate in meetings concerning the development of an individualized education program. In addition, a parent may request a due process hearing on either of those decisions.

What is particularly significant about these early points in the process is that they provide parents and school officials with an opportunity to develop a collaborative, non-adversarial relationship before any hard and fast decisions have been made on a unilateral basis by school officials. Under the judicial model of due process, the first notice which was required was to inform the parent of a decision to change a child's program.

Because of the emphasis of P. L. 94-142 on early parent involvement, and because of the desirability of involving parents early to receive their input and to forestall later adversarial relationships, it is very important that LEAs invest substantial resources at this stage rather than waiting until lines of communication have closed and an adversarial relationship has begun. What is particularly crucial to emphasize, therefore, is that effective parent involvement in the early stages of the decision-making process will pay off in a reduction in later adversarial relationships and in an increase in informed educational program decisions.

With regard to the pre-placement evaluation, it is essential that the parents be informed of the specific procedures and content of the evaluation which is proposed for *their child*. This is required by section 505(a)(2) and (3) of the Regulations and by the parental consent requirement contained in section 504(b)(1). Thus, when an LEA proposes to conduct a pre-placement evaluation, it is crucial that it give a notice which fully and precisely informs the parents of the content of the evaluation so that they can exercise an informed consent and so that the evaluation can proceed with the fullest possible cooperation and involvement of the parents.

2. *The Meetings to Develop the Individualized Education Program*

Unlike the typical notice requirement which merely informs the parents of upcoming decision points in the process, the notice of the meetings to develop the individualized education program asks the parent to be involved in the decision-making process by participating in meetings to develop an individualized education program. This involvement of parents is important for all of the reasons stated in the previous subsection and also because effective parental involvement in decision-making will virtually insure a more informed decision and a collaborative home and school relationship.

For this reason, it is crucial that the notice of meetings be clear and simple and communicated in such a manner as to encourage parents to attend. The content of the notice is specified by section 345(b) which provides that the notice "must indicate the purpose, time and location of the meeting, and who will be in attendance." The Regulations also encourage the use of informal techniques to involve parents. Some of these are specified in sections 345(a) and (d) which require that the parents be notified "early enough to insure that they will have an opportunity to attend," that the meeting will be "at a mutually agreed on time and place," and that "if neither parent can attend, the public agency shall use other methods to insure parent participation, including individual or conference telephone calls."

3. *The Later Decision-Making Points*

As the process moves toward resolution, the emphasis must be on a full and accurate description of the proposed placement decision and program. Thus, although informal meetings and other contacts should continue to be utilized in explaining the placement decision and describing the proposed program, it is essential that parents be provided precise and detailed information which will enable them to exercise an informed consent, request a due process hearing or take some other action which they deem appropriate.

B. Considerations Particular to the Other Components of the Special Education Process

1. *The Independent Evaluation*

The right to an independent evaluation provides parents with an opportunity to secure a "second opinion" after being informed of the results of the independent evaluation. This is a vital element of the parents' due process rights since it provides the one major opportunity a parent has to question and challenge the school evaluation with "independent evidence."

Since this right is so basic to a parent's later ability to challenge a decision of the school at a due process hearing, it is essential that the right be communicated in such a manner that the parents feel that it is indeed a "right" and that it is completely appropriate for them to exercise that right if they wish. Unless this type of communication is made, many parents will feel that they are obliged to either accept the school evaluation or to request a due process hearing. Thus, the independent evaluation can serve as a pressure valve to give the parents a feeling of greater control over the process and to provide some additional time and information which can be the basis for a negotiated decision. Furthermore, it is particularly essential in the case of an independent evaluation that emphasis be placed on the fact that it is at public expense (unless contested by the LEA), since low and middle income families would be discouraged by the prospect of paying for such an evaluation.

In addition, because the right to an independent evaluation is such a vital component of the due process rights of the parent, the notice of that right should be communicated immediately prior to the precise point at which the right would be likely to be exercised. In general, this would be after the completion of the original evaluation. It would be particularly effective if this notice could be given at an informal conference at which the results of the evaluation were being discussed with the parents. This would serve the dual purpose of giving the parents a feeling of choice and of not being pressured to accept the results of the school evaluation while providing the parents with information about a basic right in a friendly and timely manner.

2. The Due Process Hearing and Subsequent Appeals

As in the case of the independent evaluation, notice of the right to a due process hearing should be communicated at the beginning of the process and at the point where the use of the right is likely to be considered by the parents. This would be at all major points of impasse and prior to the time of basic decisions such as a decision to identify, evaluate or place a child.

In order for the right to a due process hearing to be rendered effective, it is essential that all of the rights at the hearing be specified and explained and that persons who are poor or otherwise disadvantaged be provided with assistance in exercising those rights. Thus, for example, emphasis should be placed on the availability of free or low-priced lawyers or lay advocates. This is required by section 506(c) of the regulations.

If a state has adopted a mediation or other informal approach to resolving disputes between home and school prior to a formal due process hearing, notice of this informal opportunity should be made available. As in the case of the due process hearing, the parents should be advised of the availability of free or low cost lawyers or lay advocates to assist them during the mediation or other informal process.

In the case of a subsequent appeal of a decision rendered at a due process hearing, parents should receive a notice similar to that provided for the due process hearing. As in the case of the due process hearing, particular emphasis should be placed on the availability of free or low-priced lawyers or lay advocates.

3. Access to Information

The right of parents "to inspect and review any education records relating to their children" is set forth in detail in section 562 of the Regulations. This right is basic to the exercise of all other rights in P. L. 94-142 because it gives the parents access to the information they need in order to understand the process and to act intelligently.

It is essential, therefore, that the right to access to information be communicated and emphasized during the entire process. In addition, LEAs should make clear their willingness to cooperate and to facilitate parental inspection of information since this has traditionally been an area of contention between home and school.

4. The Surrogate Parent Requirement

The Regulations (section 514) require the assignment of a surrogate parent for a child in the special education process in the following situations: (1) where no parent (as defined in section 10) can be identified; (2) where the identity of the parent is known but "the public agency, after reasonable efforts, cannot discover the (parent's) whereabouts"; or (3) where a child is "a ward of the state" under the laws of the state. The "Analysis of the Final Regulation" (contained in Appendix A to the Regulations, Fed. Register, 8/23/77) states that the Regulation "was not meant to apply in situations where parents are unwilling to participate, or when an agency makes unsuccessful efforts to communicate with a known parent," but *was* meant to apply "only when the parents are unknown, *unavailable*, or the child is a ward of the state" (emphasis added, p.42508, col. 2, para. 7). Furthermore, the "Analysis" states that "(a) agencies are not allowed to appoint surrogates where parents are uncooperative or unresponsive" (p.42512, col. 2, para. 7).

In addition, P. L. 94-142, itself, provides for the appointment of a surrogate parent when the parents are "unavailable". Although the Regulations do not use the word "unavailable" in listing the three categories of children in need of surrogate parents, the "Analysis" of the Regulations states that surrogate parents *are* to be appointed where the parents are "unavailable," as long as unavailability is not equated with unresponsiveness or unwillingness to cooperate.

Since appointment of a surrogate parent is premised on parental absence and unavailability rather than refusal or failure to respond, it is essential that LEAs send notices and take other actions to insure that mere refusal or failure to respond is not equated with unavailability. Such actions might include correspondence by certified mail, with a return receipt requested at the parents' last known address, telephone calls, a visit to the last known address or to the landlord of that address, contacts with the relatives of the child or with other persons who have been significantly involved in the child's life and any other efforts which are sensible and likely to produce information in the context of the particular case. Through these actions, an LEA can insure appropriate assignments of surrogate parents.

C. Summary

During the early stages of the decision-making process, it is particularly vital for LEAs to use informal techniques and devote substantial resources to developing a friendly home and school relationship. An investment of resources and energy at this point will reduce the need for later adversarial procedures and will increase the number of informed and effective special education decisions. As the process proceeds to its conclusion, the opportunity for informal approaches diminishes and the need for clear and accurate formal statements of the decisions which are being made and of the rights of parents becomes more imperative. The meetings to develop the individualized education program are a middle point in this process and are particularly vital because they provide parents with an informal opportunity to participate in making decisions about their child. For this reason, notices of these meetings should be communicated as vigorously as possible so that parents are actively encouraged to participate.

In the case of both the independent evaluation and the due process hearing, it is essential that parents be fully informed of their rights at the points in the process when they are most likely to exercise them. In addition, low and middle income families, families whose primary language is not English and other "disadvantaged" families should be made aware that the independent evaluation is at public expense and that free and low-priced lawyers and lay advocates are available to assist at the due process hearing. This type of notice will serve to insure that poor and disadvantaged families will have an opportunity equal to that of other families to effectively exercise their rights.

LEAs must be particularly diligent in notifying parents of their right to access to information about their child and must insure that no obstacles exist which prevent the effective exercise of that right. With regard to the surrogate parent requirement, LEAs must make similar diligent efforts to insure that surrogate parents are appointed in the appropriate situations.

CHAPTER V. METHODS OF ASSESSMENT TO EVALUATE COMPLIANCE WITH THE NOTICE AND CONSENT REQUIREMENTS OF P. L. 94-142

A. Introduction

The previous chapters have analyzed the criteria, standards and considerations which an LEA should be aware of in determining whether it is complying with both the letter and spirit of the notice and consent requirements of P. L. 94-142. Once an LEA has designed its system for implementing the notice and consent requirements, it must develop methods for determining whether the system is working. In general, the basic criterion for determining the effectiveness of a system is whether it is meeting its objectives in a cost-effective manner, with cost defined in both human and financial terms. In the case of the due process system, the ultimate objectives of LEAs in implementing the notice and consent requirements are to inform parents of their rights, to involve parents in the process of decision-making, to reduce the incidence of adversarial relationships between home and school by promoting collaborative relationships early in the process and to integrate the notice and consent requirements into the existing system in such a manner as to enhance the achievement of the ultimate goal of the system — an appropriate educational opportunity for each child in the system.

There are three principal ways for LEAs to determine whether these objectives are being met. The first is to establish criteria for implementation and to determine whether the resources of the system are being used to satisfy these criteria. For example, if one criterion is to serve the diverse needs of the families in the school's jurisdiction, it would be necessary to determine whether a survey and analysis had been done of the characteristics of those families with respect to factors such as education level, income, family structure, English-speaking ability, race and cultural segregation. Use of this first method of evaluating the effectiveness of the system would require a regular determination of how the resources of LEAs are being applied to the system.

A second method of determining whether the system is meeting its objectives is to measure the effects of the system. For example, it would be necessary to determine the proportion of parents who receive and respond to notice and consent forms if one objective of sending those forms is to involve parents in the process. This method of evaluating the effectiveness of the system would require a regular measurement of "outcomes" resulting from the resources and procedures which have been invested.

A third method of determining whether the system is working is to obtain the

174

opinions of the principal parties in the system — parents, the child, school officials and related personnel such as consultant psychiatrists, psychologists, and other professional personnel, including hearing officers hired to conduct due process hearings. This subjective measure of success of the system would provide an LEA with information on how the system is perceived by those involved in it.

1. Measuring How Resources Are Being Applied To The System

Once criteria are developed on how the notice and consent requirements of P. L. 94-142 should be implemented, it is a relatively easy matter to determine how resources are being applied to satisfy those criteria. Such a determination would involve an evaluation of whether the system has been designed in accordance with the criteria for implementation and a quantitative assessment of the resources which are being used to implement those criteria.

Referring back to the general criteria for an effective system of notice and consent, a detailed evaluation would be necessary to determine whether the system is designed to meet the following objectives: (1) to fit smoothly into the total special education system; (2) to enable maximum use of informal techniques; (3) to communicate parents' rights fully and accurately; (4) to communicate those rights in such a manner as to facilitate parental participation in the process and parental exercise of those rights; (5) to respond to the diverse needs of the families served by the LEA; (6) to reach out actively to parents rather than adopting a passive approach; (7) to respond to the particular issues presented by the consent requirements; (8) to sensitize school personnel and the public at large to the special education system; (9) to take full advantage of the requirements of parental participation early in the process by investing substantial resources to involve parents during these early stages; (10) to place particular empahsis on communicating parental rights to an independent evaluation and to due process hearings and, in particular, to facilitate effective exercise of those reights by low income families; and (11) to communicate and facilitate easy parental access to records concerning their child.

With regard to a quantitative assessment of the resources which are being applied, it would be necessary for an LEA to list under each objective of the system, the kinds of resources which are being devoted to carrying out that objective. Thus, for example, it would be necessary to determine the resources (school personnel and consultants) being used to design the system; the personnel allocated to implement the various objectives, such as the use of informal techniques; the forms and other written and graphic materials which have been developed; the surveys which have been designed and carried out to determine the nature of the population to be served; the emphasis placed on using personnel who are bilingual, black or from other cultural minorities, if such use is necessary; the training and public information programs which have been designed and implemented; and so forth. To determine whether these resources are adequate in *degree and quality* would require a further determination of whether the system is effective in meeting its objectives.

2. Measuring Outcomes

The desired outcomes for a system of notice and consent relate back directly to the underlying purposes of the system: to inform parents of their rights, to involve parents in the decision-making process and to have a total system which furthers the goal of an appropriate educational opportunity for each child. Thus, an LEA evaluating its effectiveness in carrying out these purposes would want to gather the following kinds of information: (1) the percentage of parents who receive the notice and consent forms; (2) the percentage of parents who return the consent forms; (3) the number of calls and other contacts from parents or their representatives, which convey a lack of understanding of the notice and consent forms; (4) the percentage of parents who attend the meetings to develop an individualized education program; (5) the number and proportion of due process hearings and the extent to which those hearings were requested because of inadequate information, lack of early involvement, or other avoidable factors; (6) the number and proportion of due process hearings requested because of unavoidable differences of opinion between home and school; (7) the correlation, if any, between non-response to a request for consent or for other types of parental participation and the various family characteristics (e.g., income, English-speaking ability, race, etc.) discussed earlier; and other statistical information directly related to whether the outcome of the system corresponds to its purposes.

3. Measuring The Perceptions of the Participants in the System

A third assessment technique is to ask the participants of the system whether they think the system is carrying out its purposes. Thus, for example, parents could be surveyed to determine whether they feel informed of their rights, whether the efforts to involve them have been effective from their perspective and whether they feel that they have been treated fairly. Similarly, school officials could be asked whether in their opinion the purposes of the system are being implemented. In addition, similar questions could be asked of outside consultants, hearing officers, school board members and other persons with a direct stake and interest in the outcomes of the system. These subjective determinations could then be used independently or to confirm the more "objective data" relating to inputs and outcomes.

B. Summary

In summary, once an LEA has established criteria for evaluating compliance, it can develop assessment techniques to measure the resources devoted to satisfying those criteria, the outcomes of the system and the perceptions of the participants in that system of how well the system is working. Ideally, all three general assessment techniques should be used together to establish base year information which can then be used as a yardstick against which future efforts at compliance could be measured.

CHAPTER VI. CONCLUSION

The Regulations for P. L. 94-142 contain comprehensive and detailed notice and consent requirements which are designed to involve parents fully and effectively in the special education decision-making process. This involvement extends to the very beginning of the process when a child is first identified as being a potential candidate for special education and related services to a court appeal at the end of the process, if the parent or LEA chooses to contest the issue to this point. The types of involvement which are required include a simple notice to inform the parent of an upcoming decision or event, a requirement of parental consent to a preplacement evaluation and to an initial placement decision, a notice of the right of parental involvement in meetings for the development of an individualized education program and a variety of notices of other parental rights – most notably the right to an independent evaluation, to a due process hearing and to access to information about his/her child.

The scope of parent involvement mandated by P. L. 94-142 is unprecedented in the area of special education. In fact, the mandated involvement of parents goes well beyond where virtually all of the states had progressed at the time the Regulations were promulgated. The major increases in involvement, compared to what the states have permitted, have been in several principal areas: (1) extending the involvement to the beginning stages of the process; (2) requiring parental participation in educational program meetings; (3) requiring the involvement of the child, "where appropriate," at those meetings; (4) extending the right to a "due process hearing" to all stages of the process; (5) requiring that parents be informed of the availability of free or low cost legal or other services for use at a free or low cost legal or other services for use at a "due process hearing"; (6) requiring full access to records; (7) requiring an independent evaluation at public expense (subject to an LEA appeal); and (8) providing for the assignment of surrogate parents for children without a parent or parent substitute. In addition, a variety of requirements in the Regulations make it clear that LEAs are expected to make substantial efforts to notify parents of their rights and to facilitate the exercise of those rights.

Thus, the Regulations mandate an extensive and unprecedented system of parent involvement and urge school officials to make that system one which is *effective* in communicating to and involving parents. P. L. 94-142 and its Regulations, however, can only go so far in mandating a *system* for the implementation of notice and consent requirements. Ultimately, the law boils down to a list of commands and objectives and leaves it to school officials to translate those commands and objectives into educational language and to integrate them into the educational system.

The analysis contained in this paper has been designed to delineate those commands and objectives, to recommend criteria, standards and techniques which respond to both the letter and underlying purposes of the legal mandates and to suggest various strategies for assuring the effectiveness of the resulting systems. It is the task of school officials to implement the requirements of the law in such a way as to insure that all families have equal access to the rights, benefits and privileges of the special education system. How well school systems meet this challenge will vary directly with their degree of commitment to the concept of parent involvement as partners in the special education decision-making process.

PART C

The View from the Panel

INTRODUCTION

The two day panel meeting provided an opportunity to bring together a small but diverse group of educators to react to both the study and the due process procedural safeguards position papers. The group included representatives from state and local education agencies, university department of special education, advocacy organizations, and the Bureau of Education for the Handicapped (BEH), as well as attorneys who have been involved with implementation of P. L. 94-142. Following initial BEH presentations by Dr. Linda Morra and Dr. Mary Kennedy, which set the general context for the study, authors presented summaries of their papers and responded to questions and comments. During the afternoon, panel members discussed various issues related to the study and specific papers. On the second day, small groups were formed to continue discussion of issues and develop recommendations. A general session followed to share the results of the small group sessions. An issue-by-issue summary of the panel discussion and a summary of the small group recommendations are presented in the next sections.

THE ISSUES

Problems in Implementation

Panelists agreed that in many instances the due process safeguards in P. L. 94-142 have resulted in adversarial, rather than collaborative, relationships between parents and schools. A significant portion of the first day's discussion centered on the need to develop informal communication systems with parents prior to reaching the stage of adversary relationships. One panelist stated the problem this way: "The issue is simply how we choose to implement the regulatory provisions. We can either make implementation a mechanical nightmare . . . or we can smooth the process out." Another panelist formulated the problem and a strategy for ameliorating the problem: "There are these formal [due process] requirements. They are there for a very good reason. We have to implement them in some way, but we won't implement them in a way that will destroy our school system and make every relationship with a parent a trial . . . Due process really entails a relatively informal process of trying to resolve problems early, otherwise a system will emerge which will bankrupt the country . . . As a case moves from Point A, identification, to Point B, court appeal following a due process hearing, the process becomes more formal, adversarial, and expensive. LEAs need to design a due process system where most cases will be resolved as close to Point A as possible."

Panelists agreed that schools must take an active rather than passive approach to involving parents. One suggestion was that school systems encourage the development of an attitude among personnel in which parents are viewed as regular members of the decision-making process, like teachers or school psychologists, who are helpful sources of information about the child. An informal procedure recommended by several panelists was making of home visits, especially when there is difficulty in getting parents to come to the school. Panelists recommended that, if possible, support personnel such as school social workers should conduct the visits. If not possible, however, other community resources should be investigated such as mental health and welfare social service agencies, and parent groups. The goal was viewed by the panel as developing a parent communication system which reflects the good faith efforts of school personnel, or, in other words reflects the overall feeling that the school is trying to deal fairly with parents and to involve them throughout the decision-making process.

Mediation Procedures

Even with use of informal and early communication systems, panelists recognized that some disputes between school personnel and parents will occur. "Early warning systems to put out potential fires" were recommended. One example offered was the use of "pre-hearing, hearings" in Pennsylvania; another example involved use of optional mediation in Massachusetts. Panelists agreed that instead of waiting for conflicts to reach the level of the hearing officer, mechanisms should be developed at the local level which enable school personnel and parents to start exploring the issue of difference. One panelist suggested that local mediating teams, available at local regional levels, be formed which could operate independently of either the school district or parents. The mediation procedures would be available as an alternative to the appeals process.

The Due Process Hearing

As discussed by panelists, probably 90% or more of special education cases proceed in uneventful fashion through the identification, programming, and placement process. It is important to keep in mind that the number of due process hearings is relatively small. Several of the panelists, however, warned that a high number of hearings is not necessarily indicative of a "problem" district nor is a low number of hearings or no hearings in a district necessarily indicative of a "good" system. In other words, number of hearings was viewed as an invalid criterion for use in evaluations of P. L. 94-142 implementation.

In expanding on this issue, panelists stated that the due process system is, in fact, abused when it is not used. When there is an honest difference of opinion concerning the educational program of a child, it should be resolved through the due process mechanisms. Panelists stressed that it is the responsibility of school personnel to follow through with these procedures when there is a disagreement. As stated by one panelist: "[Rember that] these procedures allow the school to challenge the parents action, such as when the parents refuse to give consent for a preplacement evaluation of their child." Another panelist added: "If we think we are right, we should ask for a hearing. That's what they are for. School personnel should not give in because they don't want to go through the hassle of a hearing." A positive feature of the due process hearing is that it does provide a way to have an impartial person consider both the points of view of parents and school personnel, weigh the evidence, and reach a decision.

Due Process Safeguards: Who Benefits?

A major concern of the panel was the accessibility of the appeals system to all parents in a community. As pointed out by one panelist, historically one of the problems with our judicial system has been that the courts have been for people with money. The lack of appeals from poor and minority families may indicate that the same problem exists in use of the P. L. 94-142 procedural safeguards. One panelist offered this perspective on use of the system: "Most of the people that have asked us to represent them [no fees involved], and the cases you read about, have to do with the parents of learning disabled children . . . Are we doing such a great job now that no parents who are members of a minority group disagree with the identification, placement, and program recommended by school personnel for their child?" Another panelist stated: "I remember the first thing people said in Massachusetts — well we've had two or three hundred appeals and not a one from the large city of Boston — they must be doing a great job there. [In fact], the situation represents a judicial failure."

The panelists agreed that access to the appeals system must be made available on an equal basis for all parents. One suggested strategy for improving access to the appeals system was a thorough evaluation of who is served in the school district under P. L. 94-142. Questions were formulated for address such as: In each major section of the city or town, what is the percentage of children who come through at least some part of the special education system? What proportion are minority group children? How many come from non-English speaking families? Within such of the sub-groups, how many of the parents attend school meetings? What is the rate of appeals within each subgroup? Panelists offered possible strategies for improving access to the system. The suggestion was made, for example, that school personnel work with community organizations to arrange babysitting services to enable more parents to attend school meetings. Another suggestion was that school personnel take responsibility for arranging for advocates to work with poor and minority group parents. A final comment was made that the problems involved in encouraging parents to exercise their rights are not limited to low income parents. Another target group, for example, would be parents of severely and/or multiply handicapped children who are potentially underserved.

The Role of the Lawyer under P. L. 94-142

An issue related to the discussion on access and hearings was the role of lawyers in P. L. 94-142 due process cases. Panelists agreed that the lawyer in a hearing can "help parents flesh out their case" and also "impose distance and control on the emotionality of parents." Panelists disagreed, however, on other aspects of the lawyer's role. First, discussion centered on whether the lawyer should represent the child or the parent. One panelist stated the position of the lawyer as child advocate this way: "We make it clear that we represent handicapped people and not the parents of handicapped children, and that we need to do our own investigation of the merits of the case . . . If, for example, the parent wants a private school placement, we would investigate the program offered by the private school and the program offered by the public school. The private school may not actually offer as good services as the public school . . . We would then try to negotiate a settlement with public school personnel." Thus, one position was that the lawyer represents the child, investigates the merits of the case, and works through negotiation with public school personnel or mediators to reach a settlement determined by the lawyer to be in the best interests of the child. The formal hearing is to be avoided, if possible. While this approach was thought possible with legal service attorneys, questions were raised about its feasibility when parents are paying the fees.

In opposition to the view of lawyer as child advocate, the position of lawyer as parent representative was articulated. The presumption that must be made in this position is that the parental interest in the education of their child is beneficial to the child. The position was stated by a proponent: "Within the limits of the law you do what the client wants. In second-guessing the parent [educationally], you're taking on a kind of awesome responsibility. You imply that there is some better person or system to serve the child . . . You have to be very, very prepared when you start interfering with the parents' perogative. You must be able to prove that you are right." No resolution of the views of the lawyer as child advocate or parent representative was obtained.

A second issue panelists identified concerned the lawyer as hearing officer. Several panelists questioned the use of the lawyer in this role, based on the fact that attorneys typically have no training or background in special education. One panelist suggested that each state develop a list of lawyers trained in child advocacy. Such a list could provide a pool of potential hearing officers experienced in representing children.

Self-Study Guides

There was some discussion of the advantages and disadvantages of self-study guides and their possible content. Alternatives were discussed such as guides which would respond to school district common concerns, guides which present the minimum requirements at the school district level, guides which present alternative ways of implementing the requirements, and guides which would describe implementation models which have been found to meet the needs of school districts with differing resource levels. Panelists pointed out that a problem in developing guides is that procedures need to be consistent with state policy, and there will be difficulty in developing a single guide which meets the needs of 50 states. On the other hand, there was some feeling that there was a lot of experience around which could be shared, such as procedures for early resolution of disputes.

RECOMMENDATION

The three panel subgroups agreed that there was a need to assist local school districts in implementing the due process provisions of P. L. 94-142, but that this assistance must start with the concerns of school district personnel. One panelist expressed the recommendation this way: "We need to address the concerns of the people who have to deliver . . . There is enough experience around to present best guesses as to how to deal with concerns." The next sections present the specific recommendations of each of the three groups.

Group I

Group I recommended the development of several documents which would respond to the concerns and needs of local education agencies implementing the due process provisions. The first document described by the group would have two major parts. One part, which panelists thought should be produced by the Bureau, would consist of a compliance criteria checklist, followed by a resource guide. While the group recognized that the Bureau's monitoring efforts focus on state implementation and that states are generally responsible for monitoring school district implementation, it was felt that the Bureau's compliance criteria would assist school districts in implementing the law. In recommending that a resource guide section follow the compliance checklist, the group reflected its belief that many documents on implementation of the due process provision have already been developed by various groups. The panelist stated that compilation of a list of these materials with a brief description of the materials, as well as their availability, would provide immediate assistance to school districts and also reduce duplication of efforts. One useful resource mentioned as an example was the step-by-step resource manual for hearing officers developed by the National Association of State Directors of Special Education.

Each SEA would have responsibility for developing the second part of the document. The group suggested that each SEA use this part of the document to compare state law and regulations with federal law and regulations on due process, describe state policies pertinent to due process such as due process standards, and provide examples of innovative "good" practice implementation of the due process requirements at the school district level. To facilitate identification of good practice examples, Group I suggested that each state host a conference with representatives from its various school districts. The school district representatives would provide implementation examples, and state personnel could select the best for inclusion in the document. The group additionally felt that production of different versions of this part of the document for different school district audiences, such as Superintendents of Schools, should be considered.

The second document recommended by the group would be compiled by BEH from the state documents. The document would be a compendium of best practices across the states. The group members suggested that a panel consisting of LEA representatives, parents of handicapped children, and handicapped persons be convened to assist in identification of these best practice examples. While the group members used the term "best practices", they emphasized identification of alternative approaches to implementation.

The group felt that there were several advantages to this recommended approach. First, states and local school districts would be more likely to use a document which they had developed and shaped to meet their own needs and concerns. Second, publication in the federal document and/or state document would serve as some reward to those LEA's with "good" practices. Third, no field-testing of the documents would be necessary as the documents would be a compilation of tried and successful practices. Finally, the states would serve as disseminators of the documents.

Group II

Five basic recommendations were made by this group. The first recommendation made by the group was that prior to developing any new materials, there should be an effort to identify and catalog all available printed materials on implementating P. L. 94-142 due process provisions. The group suggested that BEH establish a clearinghouse to collect materials developed by states, local school districts, and various professional groups. The goal would be to disseminate those materials which have already been produced. A resource guide or catalogue was suggested as a means of informing the various organizations and agencies as to the availability to the materials.

The group's second recommendation was that the primary audience for any new materials developed should be the LEA. The same material could probably be extended to parent groups and SEAs, but the primary reference should be the local practitioner.

The third recommendation was based on the group's feeling that a printed document might not be the most effective medium for reaching practitioners. The recommendation was made that alternatives to the printed document, such as television or other audio-visual productions, be considered.

A fourth recommendation concerned the content of the materials produced. Panelists in this group agreed that they did not want a compliance checklist, but rather more of a resource guide which would focus on four areas. First, the introductory part of the guide would be a translaation of the due process regulations into common language. The regulations would be restated as "ethics, courtesy, and concern for how persons work with each other when involved in a common set of purposes." The second part of the publication would provide case study descriptions of due process implementation. These case studies would attempt to be representative of the state of the art, and also indicative of promising practices. Third, the guide would include a section which described promising implementation strategies used in LEAs which vary, for example, in terms of the socio-economic levels of the population served, and size and location. Fourth, a section of the guide would address the concerns of different practitioner groups such as administrators, direct personnel, and support service personnel.

The group's final suggestion was to involve various organizations in developing definitions of promising practices. The group felt that representatives of organizations such as the American Association of School Administrators, American Association on Mental Deficiency, the Parent-Teachers Organization, and Division 16 of the American Psychological Association might be of assistance in the effort. The same groups might also be used for dissemination of the publication.

Group III

Group III recommended the development of a "helpful hints" manual. The group members felt that a self-evaluation manual would not be widely used by school districts, since a self-evaluation could place school districts in a vulnerable position with respect to outside groups. Instead of a monitoring system, the group recommended that guidance on implementation of the due process provision be offered to school districts.

The group recommended that different versions of a helpful hints manual be developed for four audiences: (1) direct service delivery personnel (e.g. teachers) and support service personnel (e.g. social workers, psychologists), (2) LEA administrative staff (e.g. principals, members of the board of education special education directors), (3) SEA administrative personnel who serve as consultants to LEAs, and (4) parents and the community at large. The major purpose of the manual would be to provide examples of how due process provisions can be implemented throughout the special education decision-making process. The manual would describe alternative practices that have been successfully used in school districts, with emphasis on practices most relevant to the particular audience. The version of the manual intended for direct service providers, for example, might include suggestions for increasing parent participation in the development of their child's individualized education program (IEP). The manual for administrators might provide alternative strategies for situations in which the developed IEP is rejected by the parents. Finally, the manual for parents might provide various strategies for obtaining explanations of test instruments administered to a child.

In addition to describing successfully used alternative practices, the manual would present implementation strategies that either had not been effective or had unintended negative consequences. The manual for administrators, for example, might provide examples of overly-legalistic notices that have received negative parent reaction. Another section of each manual would also present "bottom-line" implementation requirements.

Group III viewed the manual as not just another compliance document, but as a document which provides opportunities for the dissemination of creative practices. In line with this emphasis on creativity, the group recommended that a variety of formats be used in the manuals, such as case studies and checklists. The group also suggested that good practice examples be obtained by the SEA.

SUMMARY AND CONCLUSIONS

The three subgroups were quite consistent in their recommendations. Commonalities among the subgroups can be summarized as follows:

1. All groups saw more immediate need for technical assistance materials on implementation of the due process procedures, than for self-evaluation guides. Emphasis was placed on the identification, description, and dissemination of alternative "good-practice" implementation procedures or strategies which have been successfully used by LEAs in different contextual settings.
2. All groups agreed that the primary audience for technical assistance materials is the LEA. In addition, the groups recommended that separate versions of a technical assistance document be developed to meet the needs of different LEA staff
3. All groups saw the need to involve other educational agencies or organizations in the development of technical assistance documents. Two of the groups felt that SEAs would have a major role in developing materials, particularly in identifying good-practice examples, and disseminating the

materials. In addition, the need for each state to customize the materials was recognized by at least one group. Other possible contributors to the development of materials, mentioned by groups, were LEA and professional organization representatives.

4. All groups recommended the development of technical assistance materials which would solely address the due process provisions. Panelists agreed that an attempt to address additional provisions of the law in the same document would result in an impractically large document.
5. Two of the three groups recommended that BEH disseminate its due process procedural safeguards compliance procedure to LEAs, although not necessarily as part of the above effort. While recognizing that the Bureau's monitoring system is directed towards state implementation and states have responsibility for monitoring school district implementation, panelists felt that the standards would be of assistance to school districts.
6. Two of the three groups recommended that prior to the development of any new materials, effort be directed to identify, catalog, and disseminate existing materials on implementation of due process safeguards. Panelists felt that many materials exist but have not been effectively disseminated, and that there is too high a potential for duplication of effort.

The BEH has one project planned for FY 1979 which should meet some of the technical assistance needs delineated by these panelists. The purposes of the project are to: (1) identify and describe strategies related to effective implementation of the due process notification and dispute settlement provision, (2) select or develop information and training packages corresponding to the identified strategies, and evaluate the packages effectiveness by implementing them in selected LEAs, and (3) disseminate the most promising information and training practices. A major concern of the Bureau is the provision of due process procedural safeguards to parents or guardians of handicapped children. The position papers and summaries of panel discussions in this monograph suggest many strategies for effective implementation of P.L. 94-142 due process provisions. It is our hope that dissemination of this monograph stimulates other thoughts on achieving quality implementation of the due process procedural safeguards provisions of P.L. 94-142.

DUE PROCESS SAFEGUARDS CRITERIA STUDY PANEL PARTICIPANTS

June 20-21, 1978

Mr. Bob Audette
Audette and Associates
Chelmsford, MA

Mr. Donald Bersoff
Assistant Professor of Law
University of Maryland Law School

Dr. Milt Budoff, Director
Research Institute for
Educational Problems, Inc.
Cambridge, MA

Mrs. Kathleen Fenton
Education Program Specialist
State Program Studies Branch
Bureau of Education for the Handicapped

Mr. Donroy Hafner
Director of Instructional Services
Region XIII Education Service Ctr.
Austin, TX

Dr. Scottie Torres Higgins
Asst. Director for Policy Research
Government Relations Unit
The Council for Exceptional Children
Reston, VA

Dr. Mary Kennedy
Acting Branch Chief
State Program Studies Branch
Bureau of Education for the Handicapped

Mr. Lawrence Kotin
Attorney-at-Law
Lawrence Kotin & Associates
Arlington, MA

Dr. Peter Kuriloff
Associate Professor
School of Education
University of Pennsylvania

Dr. Jack Lamb
General Director of Special and
Exceptional Student Programs
Hillsborough County Public Schools
Tampa, FL

Dr. Stuart Losen
Coordinator of Special Services
New Canaan Public Schools
New Canaan, CT

Dr. Stuart Mandell
Director of Research and Pupil
Services
Covina Valley Unified School Dist.
La Habra, CA

Dr. Linda G. Morra
Evaluation Program Specialist
State Program Studies Branch
Bureau of Education for the
Handicapped

Mr. Ray Myers
State Policy and Administrative
Branch
Bureau of Education for the
Handicapped

Mr. Glenn Smith
National Association of State
Directors of Special Education
Washington, D.C.

Dr. Donald Whitney
Director, Special Services
Educational Service District
No. 121
Seattle, WA

Dr. Ron Yoshida
Education Program Specialist
Program Support Branch
Bureau of Education for the
Handicapped